No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

PATRICIA J. REYNOLDS, PHYLLIS BRAUNER, AND ELIZABETH PALYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes, rules, and regulations involved	3
Statement	3
Specification of errors to be urged	8
Summary of argument	8
Argument	15
I. The report of the Air Force Accident Investigation Board and the statements of witnesses before the Board are privileged against discovery	19
A. R.S. 161 vests in the Secretary of the Air Force the power to determine finally that the documents in question are privileged	20
1. Privilege against demands by Congress	21
2. Privilege against demands by court	30
B. The power of the Secretary to determine finally that the documents in question are privileged is supported by considerations of public policy recognized by the common law	36
1. State statutes and common law decisions	37
2. Public policy considerations	43
C. Even if a department head's refusal to produce might be reviewable in other circumstances, there is no occasion here to review or disturb the Secretary's determination	47
II. The court below erred in permitting the executive privilege against disclosure to be circumvented by finding a waiver of the privilege in the Tort Claims Act and Federal Rules of Civil Procedure	52
A. Nothing in the Tort Claims Act or Federal Rules imposes on the department head any duty of disclosure	55
B. The decision below violates the Executive's privilege by penalizing the United States	62
III. Good cause for discovery has not been shown	69
Conclusion	74
Appendix	75

CITATIONS

Cases:

	Page
Adams v. *Nagle*, 303 U.S. 532	48
Admiralty Commissioners v. *Aberdeen Steam Trawling & Fishing Co.*, [1909] Sess. Cas. 335	40
Alltmont v. *United States*, 177 F. 2d 971, certiorari denied, 339 U.S. 967	4, 66
American Power Co. v. *Securities and Exchange Commission*, 329 U.S. 90	51
Anglo-Saxon Petroleum Co. v. *United States*, 78 F. Supp. 62	66
Anniston Mfg. Co. v. *Davis*, 301 U.S. 337	69
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288	69
Bank Line, Ltd. v. *United States*, 68 F. Supp. 587	66
Bank Line, Ltd. v. *United States*, 163 F. 2d 133	19, 66
Bank Line Ltd. v. *United States*, 76 F. Supp. 801	66
Berger v. *Central Vermont R. Co., Inc.*, 8 F.R.D. 419	71
Boske v. *Comingore*, 177 U.S. 459	10, 20, 31, 73
Butler v. *United States War Shipping Admin.*, 68 F. Supp. 441	65
Chapman v. *United States*, 194 F. 2d 974, now pending on petition for a writ of certiorari, No. 105, this Term	19, 72
Chicago, B. & Q. Ry. Co. v. *Babcock*, 204 U.S. 585	47, 48
Comingore, In re, 96 Fed. 552	31
Consolidated Rendering Co. v. *Vermont*, 207 U.S. 541	68
Cooper v. *O'Connor*, 99 F. 2d 135	64
Thomas Cooper, Trial of, Wharton's State Trials of the United States, 659	22, 33
Cresmer v. *United States*, 9 F.R.D. 203	66
Dasher v. *United States*, 59 F. Supp. 742	65
Decatur v. *Paulding*, 14 Pet. 497	49
Dwelly v. *McReynolds*, 6 Cal. 2d 128, 56 P. 2d 1232	38
Duncan v. *Cammell, Laird & Co.*, [1942] A. C. 624,	11, 38, 41, 54
Endo, Ex parte, 323 U.S. 283	69
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134	49
Federal Life Ins. Co. v. *Holod*, 30 F. Supp. 713	20
Feres v. *United States*, 340 U.S. 135	59
Firth Sterling Steel Co. v. *Bethlehem Steel Co.*, 199 Fed. 353	36
Fleming v. *Bernardi*, 1 F.R.D. 624	66
Fleming v. *Superior Court*, 196 Cal. 344, 238 Pac. 88	38
French, In re, 315 Mo. 75, 285 S.W. 513	38
Frost Trucking Co. v. *Railroad Comm.*, 271 U.S. 583	68
Gray v. *Pentland*, 2 S. & R. (Pa.) 23	43

Cases—Continued

	Page
Gray v. *Powell*, 314 U.S. 402	51
Gregoire v. *Biddle*, 177 F. 2d 579, certiorari denied, 339 U.S. 949	64
Grimley, In re, 137 U.S. 147	49
Groce, In re, 180 Fed. 62	36
Grossman, Ex parte, 267 U.S. 87	26
Hammond Packing Co. v. *Arkansas*, 212 U.S. 322	68
Thomas Hardy, Trial of, 24 How. Stat. Tr. 199	43
Hartranft, Appeal of, 85 Pa. 433	35
Herrnstein, In re, 20 Ohio Ops. 405, 6 Ohio Supp. 260	38
Hickman v. *Taylor*, 153 F. 2d 212, affirmed, 329 U.S. 495	15, 19, 72, 73
Hickok v. *Margolis*, 221 Minn. 480, 22 N.W. 2d 850	38
Hovey v. *Elliott*, 167 U.S. 409	68
Huttman, In re, 70 Fed. 699	20
Inland Waterways Corp. v. *Young*, 309 U.S. 517	27
Interstate Commerce Commission v. *Oregon-Washington R. & N. Co.*, 288 U.S. 14	69
Kerotest Mfg. Co. v. *C-O-Two Co.*, 342 U.S. 180	53
Labor Board v. *Jones & Laughlin Corp.*, 301 U.S. 1	69
Lamberton, In re, 124 Fed. 446	20
Lang v. *Wood*, 92 F. 2d 211, certiorari denied, 302 U.S. 686	64
Leave v. *Boston El. Ry. Co.*, 306 Mass. 391, 28 N. E. 2d 483	38
Lester v. *Isbrandtsen Co.*, 10 F.R.D. 338	71
Manufacturers Trust Co., Appl. of, 269 App. Div. 108, 53 N.Y.S. 2d 923	38
Marbury v. *Madison*, 1 Cranch 137	11, 31
Maryland Casualty Co. v. *Clintwood Bank*, 155 Va. 181, 154 S.E. 492	38
Maryland to use of Kent v. *United States*, [1947] A.M.C. 1336	66
Missouri Pacific R.R. Co. v. *Ault*, 256 U.S. 554	65
Mitrovich v. *United States*, 15 F. 2d 163	43
Oklahoma Tax Comm. v. *Clendinning*, 193 Okla. 271, 143 P. 2d 143	38
Pacific-Atlantic S.S. Co. v. *United States*, 175 F. 2d 632, certiorari denied, 338 U.S. 868	66
Peden v. *Peden's Adm'r*, 121 Va. 147, 92 S. E. 984	38
Pekelis v. *Transcontinental & Western Air, Inc.*, 187 F. 2d 122, certiorari denied, 341 U.S. 951	46
Perkins v. *Endicott Johnson Corp.*, 128 F. 2d 208, affirmed, 317 U.S. 501	47
Pollen v. *Ford Instr. Co.*, 26 F. Supp. 583	36
Quarles and Butler, In re, 158 U. S. 532	43
Radio Corporation of America v. *United States*, 341 U.S. 412	51

Cases—Continued

	Page
Reeves v. *Pensylvania Railroad Co.*, 8 F.R.D. 616	71
Rex v. *Davies*, [1945] 1 K.B. 435	40
R. H. Stearns Co. v. *United States*, 291 U.S. 54	53
Robinson v. *State of South Australia*, [1931] A. C. 704	39
Sackett, Ex parte, 74 F. 2d 922	20
Samish v. *Superior Court*, 28 Cal. App. 2d 685, 83 P. 2d 305	38
Securities & Exchange Commission v. *Central-Ill. Securities Corp.*, 338 U.S. 96	51
Securities & Exchange Comm. v. *Chenery Corp.*, 318 U.S. 80	51
Segurola v. *United States*, 16 F. 2d 563	43
Sibbach v. *Wilson & Co.*, 312 U.S. 1	69
Simonsin v. *Barth*, 64 Mont. 95, 208 P. 938	38
Smith's & Ogden's Trial, Lloyd's Rep. 2	33
Southern Steamship Co. v. *NLRB*, 316 U.S. 31	60
Spalding v. *Vilas*, 161 U.S. 483	64
Stegall v. *Thurman*, 175 Fed. 813	39
Terral v. *Burke Const. Co.*, 257 U.S. 529	68
Thaden v. *Bagan*, 139 Minn. 46, 165 N.W. 864	38
Thompson v. *German Valley R. Co.*, 22 N.J. Eq. 111	35
Totten v. *United States*, 92 U.S. 105	36, 42
Touhy v. *Ragen*, 340 U.S. 462	9, 10, 16, 20, 21, 73
United States v. *Andolschek*, 142 F. 2d 503	67
United States v. *Beekman*, 155 F. 2d 580	67
United States v. *Butler*, 297 U.S. 1	49
United States v. *Chemical Foundation*, 272 U.S. 1	53
United States v. *Cotton Valley Operators Committee*, 9 F.R.D. 719, affirmed *per curiam*, 339 U.S. 940	9, 14, 16, 17, 66
United States v. *Eliason*, 16 Pet. 291	51
United States v. *Geisler*, 174 F. 2d 992; certiorari denied, 338 U.S. 861	61
United States v. *George S. Bush & Co.*, 310 U.S. 371	51
United States v. *Grayson*, 166 F. 2d 863	67
United States v. *Hull*, 195 F. 2d 64	59
United States v. *Krulewitch*, 145 F. 2d 76	67
United States v. *Li Fat Tong*, 152 F. 2d 650	43
United States v. *Lorain Journal Co.*, 10 F.R.D. 487	66
United States v. *Macdaniel*, 7 Pet. 1	26
United States v. *Midwest Oil Co.*, 236 U.S. 459	26
United States v. *Moses*, Fed. Cas. No. 15825	43
United States v. *Nelson*, 91 F. Supp. 557	65
United States v. *Schine Chain Theaters*, 4 F.R.D. 108	66
United States v. *Sherwood*, 312 U.S. 584	59
United States v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77	69
United States v. *Yellow Cab Co.*, 340 U.S. 543	55

Cases—Continued

	Page
Universal Airline, Inc. v. *Eastern Air Lines*, 188 F. 2d 993	46
Valecia Condensed Milk Co., In re, 240 Fed. 310	20
Vogel v. *Gruaz*, 110 U.S. 311	43
Walling v. *Comet Carriers*, 3 F.R.D. 442	20, 66
Walling v. *Richmond Screw Anchor Co.*, 4 F.R.D. 265	66
Weeks, In re, 82 Fed. 729	20
Wilkes v. *Dinsman*; 7 How. 89	53, 64
Wittenberg Coal & Coke Co. v. *Compagnie Havraise Peninsulaire, etc.*, 22 F. 2d 904	68
Worthington v. *Scribner*, 109 Mass. 487	43
Wright-Papoose, The, 2 F. Supp. 43	66
Wunderly v. *United States*, 8 F.R.D. 356	66
Yakus v. *United States*, 321 U.S. 414	64
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579	27

Federal, State and Foreign Statutes:

Civil Aeronautics Act, 52 Stat. 1012, as amended, 49 U.S.C. 581, Sec. 701	46
Federal Tort Claims Act:	
Sec. 410 (28 U.S.C. 1346, 2674)	55
Sec. 411 (60 Stat. 844, 28 U.S.C. (1946 ed.) 932)	56
Interstate Commerce Act, as amended, 36 Stat. 351, 45 U.S.C. 41	45
Revised Statutes, Sec. 161 (5 U.S.C. 22),	2, 9, 10, 13, 16, 20, 21, 59, 75
1 Stat. 28	21
1 Stat. 49	21
1 Stat. 65	21
1 Stat. 68	21
1 Stat. 553	21
Tucker Act, March 3, 1887, c. 359, 24 Stat. 505, 506, Sec. 6	61
28 U.S.C. 1346	13, 60
2507	58
2674	7, 13, 60, 75
2680	59
Calif. Code Civ. Proc. Ann., Sec. 1881(5) (1941)	37
Colo. Stat. Ann., Ch. 177, Sec. 9 (1949)	37
Georgia Code Ann., Sec. 38-1102 (1937)	37
Idaho Code, Ann., Sec. 9-203 (1948)	37
Code of Iowa, Sec. 622.11 (1946)	37
Minn. Stat. Ann., Sec. 595.02 (5) (West 1947)	37

Federal, State and Foreign Statutes—Continued

	Page
Mont. Rev. Code Ann., Sec. 10536 (5) (1935)	37
Neb. Rev. Stat., Sec. 25-1208 (1948)	37
Nev. Comp. Laws Ann., Sec. 8975 (1929)	37
North Dakota Rev. Code, Sec. 31-0106 (1943)	37
Oregon Comp. Laws Ann., Sec. 3-104 (5) (1940)	37
South Dakota Code, Sec. 36.0101 (5) (1939)	37
Utah Code, Sec. 104-49-3 (1943)	37
Washington Rev. Stat. Ann., Sec. 1214 (5) (1932)	37
Crown Proceedings Act. 1947, 10 & 11, Geo. 6, C. 44, Sec. 28	42

Miscellaneous:

Advisory Committee on Rules of Civil Procedure, Notes of, S. Doc. No. 101, 76th Cong., 1st Sess., p. 271	61
Air Force Regulation, No. 62-7	20, 21, 50, 78
Air Force Regulation, Amended, 62-14A	44, 49, 50
American Law Institute, *Model Code of Evidence* (1942), Rule 288	34
20 Can. Bar Rev. 805	42
21 Can. Bar Rev. 51	42
17 Cong. Rec. 2211-2814	28
17 Cong. Rec. 2622-2623	29, 30
17 Cong. Rec. 2813-2814	29
17 Cong. Rec. 4095	28
96 Cong. Rec. 565-66	22
96 Cong. Rec. 1400	22
1 Dillon, *Marshall: Life, Character, Judicial Services*, XLVI-XLIX (1903)	32
Directive of President Truman, March 13, 1948, 13 F.R. 1359	25, 29, 37
Federalist, The, Nos. XLVII, XLVIII	23

Federal Rules of Civil Procedure:

Rule 26	56, 57, 74
Rule 27	56, 57
Rule 28	57
Rule 29	57
Rule 30	57
Rule 31	57
Rule 32	57
Rule 33	4, 57
Rule 34	2, 3, 4, 14, 19, 36, 55, 57, 70, 75
Rule 35	57
Rule 36	57
Rule 37	6, 13, 57
Rule 37(b)(2)	55, 62, 76
Rule 45	57, 74
Rule 55(e)	61, 62, 78

Miscellaneous—Continued

	Page
3 Ford, *Writings of Thomas Jefferson* 55-57, 62 (1898)	32, 33
1 Greenleaf, *Evidence* (18[illegible]), Sec. 251	34
Hearings Before House Committee on the Judiciary on H. R. 5376 and H. R. 6463, 77th Cong., 2d sess., pp. 61-62	56
H. J. Res. 342, 80th Cong., 2d Sess.	29
H. Rept. No. 36, 61st Cong., 2d Sess., p. 3	46
H. Rept. No. 141, 45th Cong., 3rd Sess., pp. 3, 4	27
H. Rept. No. 308, 80th Cong., 1st Sess., p. A 239	61
H. Rept. No. 1595, 80th Cong., 2nd Sess., pp. 2-3, 7	27, 30
H. R. 5373, 77th Cong., 2d Sess., Secs. 202 and 205	56
H. R. 6463, 77th Cong., 2d Sess., Sec. 302	56
H. Res. 427, 81st Cong., 2d Sess.	22
H. Res. 465, 96 Cong. Rec. 1695	22
H. Res. 469, 96 Cong. Rec. 1765	22
3 Jones, *Evidence* (4th Ed. 1938), Sec. 762	34
22 Journals of the Continental Congress 92 (1782)	23
58 L. Q. Rev. 31	42
58 L. Q. Rev. 31	42
58 L. Q. Rev. 436	39, 42
59 L. Q. Rev. 102	42
193 L. T. 224	42
Note, 165 A.L.R. 1302	37
11 Ops. A. G. 137	33
15 Ops. A. G. 378	33
16 Ops. A. G. 24	33
25 Ops. A. G. 326	34
40 Ops. A. G. 45	34
Proceedings of the Institutes on the Federal Rules of Civil Procedure, Washington, D. C., 1938, pp. 101, 105, 266	56, 58
Proceedings of the Institutes on the Federal Rules of Civil Procedure, Cleveland, Ohio, 1938, p. 34	57
R.S. 161, 5 U.S.C. 22	
8 Richardson, *Messages and Papers of the Presidents*, 375-383	28
1 Robertson, *Burr's Trials* 177, 180, 186-188 (1808)	32
2 Robertson, *Burr's Trials* pp. 511, 533-536	33
Sanford, *Evidentiary Privileges against the Production of Data Within the Control of Executive Departments*, 3 Vanderbilt L. Rev. 73, 82 (1949)	37
Sen. Misc. Doc., Vol. 7, 52nd Cong., 2d Sess., pp. 235-243	28
S. Rept. No. 1559, 80th Cong., 2d Sess., p. 12	56
Wigmore, *Evidence* (1905 Ed.), Sec. 2375	34
8 Wigmore, *Evidence* (3d ed., 1940):	
Sec. 2367	22
Sec. 2371	22

Miscellaneous—Continued

	Page
Sec. 2374	43
Sec. 2378	42
Sec. 2378a	34, 42
Sec. 2379	42

Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 Fed. Bar J.:

p. 103	26
p. 147	26
p. 319	24
pp. 328-330	24

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OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania (R. 17-21) is reported at 10 F.R.D. 468. The opinion of the Court of Appeals for the Third Circuit (R. 44-58) is reported at 192 F. 2d 987.

JURISDICTION

The judgments of the Court of Appeals were entered on December 11, 1951 (R. 59-60). The petition for a writ of certiorari was filed on March

7, 1952, and granted on April 7, 1952. 343 U.S. 918. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In suits under the Tort Claims Act respondents sought discovery, under Rule 34 of the Federal Rules of Civil Procedure, of the report of an Air Force Accident Investigation Board and of statements made to the Board. The Secretary of the Air Force filed a claim of privilege in the District Court on the ground that the disclosure of the Board's reports and the statements would seriously hamper national security and flying safety as well as the development of highly technical military equipment, and would discourage uninhibited statements by witnesses in the course of such investigations. The District Court nevertheless ordered the reports of the Accident Investigation Board and the statements produced so that it might review the claim of privilege, and when the Secretary declined to produce them, ordered that respondents' version of the facts on the issue of negligence be taken as established. The Court of Appeals affirmed. The questions presented are:

1. Whether the Secretary's determination that the documents are privileged can and should, consistently with R.S. 161 and the doctrine of separation of powers, be reviewed by the judiciary.

2. Whether Congress in the Tort Claims Act could or intended to force the executive to submit to judicial review of his determination or suffer

judgment to be entered against the United States.

3. Whether respondents have shown good cause for discovery, as required by Rule 34, Federal Rules of Civil Procedure.[1]

4. Whether the validity of the Secretary's determination can be tested in this case in the absence of the issuance of direct process against him.

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent portions of R.S. 161, 5 U.S.C. 22; the Federal Tort Claims Act (28 U.S.C. 2674); Rules 34, 37 and 55 of the Federal Rules of Civil Procedure; and Air Force Regulations Nos. 62-14A and 62-7 are set forth in the Appendix at pp. 75-81.

STATEMENT

These were actions under the Federal Tort Claims Act, arising from the deaths of three privately employed engineers in the crash of an Air Force B-29 Bomber near Waycross, Georgia, on October 6, 1948 (R. 4).[2] The facts, which are not in dispute, are as follows:—

The aircraft, carrying nine crew members and four privately employed observers, was engaged in operations for the experimental testing of secret electronics equipment. Of the thirteen persons aboard, nine were killed, including six crew mem-

[1] The right to present this question, not set forth in the petition for certiorari as one of the questions presented, was reserved by us at that time (Pet. 13, fn. 7).

[2] Two of the plaintiffs, Brauner and Palya, joined in the institution of one action; the third, Reynolds, instituted a separate action (R. 1, 3); all three actions were consolidated for trial and on appeal in the court below (R. 37).

bers and the three civilian decedents, who were employees of the contractor and subcontractor developing the equipment being tested. The widows of the three brought these actions in the District Court for the Eastern District of Pennsylvania, seeking $300,000 each as damages under the wrongful death statute of Georgia (R. 4-6).

The only issue raised by the pleadings was that of the negligence of the Government (R. 7). The plaintiffs moved under Rule 34, Federal Rules of Civil Procedure, *infra*, pp. 75-76,[3] for an order directing the government to produce (1) the official report of the Air Force Accident Investigation Board conducted under its regulations, *infra*, pp. 76-81, and (2) the statements made by the surviving members of the crew at the closed hearings before that Board (R. 14-16). The District Court granted the motion for discovery, holding (1) that the plaintiffs' affidavits (R. 15, 16), which stated generally that knowledge of the contents of the documents in question was "essential to a preparation of plaintiffs' case for trial", constituted an adequate showing of good cause within the requirements of Rule 34 and (2) that the documents were not privileged (R. 17-21).

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[3] Respondents first submitted interrogatories under Rule 33. These included requests that the accident investigation report and the statements of survivors be attached to the answer (R. 8-11). The answer to the interrogatories declined to produce the documents on the ground that such discovery was not within the scope of Rule 33 (R. 11-14). *Hickman* v. *Taylor*, 329 U.S. 495, 504; *Alltmont* v. *United States*, 177 F. 2d 971 (C.A. 3), certiorari denied, 339 U.S. 967. Respondents then proceeded with their motion under Rule 34 (R. 14).

After having been notified of this action, the Secretary of the Air Force, on his own initiative, caused a letter to be presented to the District Court. This letter stated:

> Acting under the authority of Section 161 of the Revised Statutes (5 U.S.C. 22), it has been determined that it would not be in the public interest to furnish this report of investigation as requested by counsel in this case. This report was prepared under regulations which are designed to insure the collection of all pertinent information regarding aircraft accidents in order that all possible measures will be developed for the prevention of accidents and the optimum promotion of flying safety. Because this matter is one of such primary importance to the Air Force, it has been found necessary to restrict the use of aircraft accident reports to the official purpose for which they are intended. Under our regulations, this type of report is not available in courts-martial proceedings or other forms of disciplinary action or in the determination of pecuniary liability.
>
> It is hoped that the extreme importance which the Department of the Air Force places upon the confidential nature of its official aircraft accident reports will be fully appreciated and understood by your Honorable Court.

On the basis of this letter, the District Court held a rehearing of the motion for discovery (R. 21, 28). At this hearing a formal claim of privilege, signed by the Secretary, and reiterating the

grounds set forth above, was presented to the court (R. 21-25). The claim further stated that the airplane involved had been carrying confidential equipment and that disclosure of details of its mission, operation or performance would for that reason be against the public interest. Two affidavits were also submitted, one by the Secretary (R. 25), which set forth the statutory authority for the regulations forbidding disclosure of reports and proceedings of Accident Investigation Boards, and the other (R. 27) by the Judge Advocate General of the Air Force, which offered to furnish the names and addresses of the survivors, undertook to make these witnesses available for pretrial depositions under the Rules at respondents' will and at Government expense, and guaranteed to authorize the witnesses to testify to all matters pertaining to the cause of the accident except as to classified material.

An amended order was then issued by the district judge (R. 28), to the effect that the Government should produce for examination by the court the documents in question, so that the court could determine whether the disclosure "would violate the Government's privilege against disclosure of matters involving the national or public interest." Compliance with this order was not forthcoming and the district judge thereupon issued an order, under Rule 37, *infra*, pp. 76-77, that the facts in plaintiffs' favor on the issue of negligence be taken as established (R. 29). Subsequently, on the basis of this order, after a hearing for the assessment

of damages, the court entered final judgment for the respondents (R. 32, 33).

The Court of Appeals affirmed (R. 44-58). It first upheld the District Court's determination that respondents had shown good cause for discovery and then proceeded to deal with the question of privilege (R. 48). It stated that Air Force regulations forbidding disclosure were not in issue because they applied only to subordinate employees of the Department, whereas the statute (R.S. 161) gave the Secretary himself power to disclose the documents; and a proper order directed against the United States would have the effect of compelling the Secretary personally to comply. Also on the ground that the order was directed against the United States and did not result in direct sanctions against the Secretary, the court held that it need not reach "difficult constitutional questions arising out of the separation of powers" which would have been presented most squarely if the District Court had issued an order directed to the Secretary (R. 49-50).

The propriety of avoiding this problem by an order directed against the United States the court upheld by deciding that the Tort Claims Act, in so far as it makes the Government liable "in the same manner * * * as a private individual" (28 U.S.C. 2674, *infra*, p. 75) and makes the Federal Rules applicable to suits under it, constitutes a waiver of whatever privilege might exist for the documents in other actions (R. 50-53).

After having thus disposed of the case by holding

that the privilege had been waived, the court went on to hold, despite the Secretary's affidavit to the contrary, that recognition of a privilege based on the asserted necessity of encouraging free discussion at investigations would be against public policy and that the Tort Claims Act must be read as offering the Government a categorical choice of either disclosing the documents or suffering judgment against it. Rejecting the contention that disclosure would affect military security, the court further stated that the question of the need for secrecy must be passed on by the trial judge after examining the documents *in camera*.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:—

1. In holding the report of the Air Force Accident Investigation Board and the statements of the witnesses before it not privileged against discovery;

2. In holding that the Government was properly barred from presenting evidence on the issue of negligence;

3. In holding that the Government was properly found negligent;

4. In holding that good cause was shown for ordering discovery of the documents;

5. In entering judgment for the respondents.

SUMMARY OF ARGUMENT

The decision below is an unwarranted interference with the powers of the executive, forcing the department head to choose whether to disclose pub-

lic documents contrary to the public interest, or to suffer the public treasury to be penalized. This forced choice is contrary to R.S. 161, to historic practice, and to the practical requirements of administration. *Touhy* v. *Ragen*, 340 U.S. 462, and *United States* v. *Cotton Valley Operators Committee*, 9 F. R.D. 719 (W.D. La.), affirmed *per curiam* by an equally divided court, 339 U.S. 940, dealt with related but distinguishable problems. It is the government's position (1) that the courts lack power to compel disclosure by means of a direct demand on the department head; (2) that the same result may not be achieved by the indirect method of an order against the United States, resulting in judgment when compliance is not forthcoming, and that Congress has not sanctioned such a procedure either in the Tort Claims Act or in the Federal Rules of Civil Procedure; and (3) that good cause for discovery, required by the Federal Rules to be shown, does not exist in the circumstances of this case.

I

Discovery under the Federal Rules is limited to matters "not privileged" and thus excludes material privileged by the Constitution, by statute, or by the common law. The documents in question are privileged within the meaning of this rule.

A. R. S. 161, which authorizes the head of a department to prescribe regulations for the custody, use, and preservation of records and which we regard as a statutory affirmation of a constitu-

tional privilege against disclosure, protects the executive against direct court orders for disclosure by giving the department heads sole power to determine to what extent withholding of particular documents is required by the public interest.

1. The constitutional privilege thus confirmed has a long history and has frequently been asserted against and recognized by both Congress and the courts. R. S. 161 asserts the executive's independence of Congress, as well as of the courts, in respect of departmental documents, representing in this regard a reversal of the parliamentary system of the Continental Congress and an implementation of the doctrine of separation of powers. The privilege recognized by it has been asserted against Congressional demands for the production of executive documents on numerous occasions, giving rise to important debates, one of which occurred as recently as 1948. These assertions of privilege have been uniformly successful, and the various Congresses have, even in the heat of contest, conceded their propriety.

2. The privilege claimed has also been asserted against demands by the courts for disclosure. These, too, have been successful, although usually the cases have not been pushed by either side to a final show of force. *Boske* v. *Comingore*, 177 U.S. 459, and *Touhy* v. *Ragen*, 340 U.S. 462, upheld one aspect of the privilege, holding that regulations under R. S. 161 validly protected subordinate officers of executive departments against demands for disclosure. Earlier examples, more directly appo-

site to the power of department heads to withhold production, include *Marbury* v. *Madison,* 1 Cranch 137, and Burr's trials, where counsel for the Government refused to divulge, in response to subpoenas, confidential portions of documents in the possession of the executive.

B. 1. Fourteen states have statutes forbidding disclosure of confidential communications to the executive when the public interest would suffer from disclosure; other states confer privilege on various specific classes of documents. The House of Lords, in a decision which should be given great weight, *Duncan v. Cammell, Laird & Co.,* [1942] A.C. 624, has held that ministers have sole power to decide whether disclosure should be made of departmental documents. In addition, there are well settled privileges for state secrets and for communications of informers, both of which are applicable here, the first because the airplane which crashed was alleged by the Secretary to be carrying secret equipment, and the second because the secrecy necessary to encourage full disclosure by informants is also necessary in order to encourage the freest possible discussion by survivors before Accident Investigation Boards.

2. The importance of encouraging free discussion, emphasized by the Secretary, should serve as a basis for the application of the informer's privilege in the circumstances of this case. This consideration has always caused Congress, whenever the situation was placed before it, expressly to recognize a privilege for reports of public accident in-

vestigations, as it has done in the Interstate Commerce and Civil Aeronautics Acts (with respect to commercial and private air crashes). It would certainly seem that investigations of military air accidents should be clothed with the same freedom from use in litigation.

C. The preceding subsections have set forth grounds on which the courts should reach the conclusion that the documents here involved are privileged. It leaves out of express consideration the decisive factor that the decision not to disclose is an administrative decision, delegated to the department heads by Congress in R.S. 161, as to which only the administrator can know all the relevant policy factors. The Secretary, basing his conclusions on the desirability of protecting witnesses in order that they might feel free to testify fully and, presumably, acting with full cognizance of the possible hardship to the respondents, has made an administrative determination. The courts should not interfere in such policy determinations without, at least, a showing that the executive determination is plainly arbitrary. No such reasons exist here, for, as noted, the Secretary's determination was clearly founded on adequate considerations.

II

Hence, the courts lack power to exert compulsion toward disclosure in the form of a direct demand on the department head. The court below, however, held that the Tort Claims Act was intended to permit avoidance of the executive privilege by

authorizing an order directed to the United States and resulting, should the department head fail to comply, in a bar order under Rule 37, forbidding the United States to contest the issue of negligence. But it is clear that nothing in the Tort Claims Act imposes on the department head any duty of disclosure or was designed to curtail the privilege.

A. The only relevant aspects of the Act are its provision for treating the United States like a private party (28 U.S.C. 1346, 2674), and the provision making the Federal Rules applicable to actions under the Act. The Rules themselves exempt privileged matter from discovery, and their legislative history makes clear that the term "privilege" includes governmental privilege. The "private party" language of the Tort Claims Act appears to deal only with substantive liability, not with procedure. And no reference is made in the Act or its legislative history to R.S. 161 or to the long history of executive privilege, of which Congress must have been aware. It is most unlikely that Congress meant to override this long-standing privilege, *sub silentio,* even assuming that it had power to do so.

Nor can the Government be likened to a private party, because its claim of privilege is made in the *public* interest. In determining where the public interest lies, the Secretary may be presumed to balance the interest in secrecy against the interest in unhampered litigation by the parties. Moreover, the Federal Rules forbid default judgments against the United States, and the bar order in

this case is, in effect, the equivalent of defaulting the Government. The prohibition of such defaults further negates the possibility of likening the Government to a private person in this situation.

B. Since nothing in the Act or the Federal Rules seeks to withdraw the executive's privilege, the question remains whether the courts below have improperly violated the privilege. This they have done because they have exerted undue compulsion on the Secretary to disclose. The Secretary has been faced with the inadmissible alternative of surrendering documents which must be kept secret, or of causing the Government to be subjected to a large judgment without any proof of liability. The judgment is in effect a penalty on the Government for the Secretary's choice not to disclose.

This penal aspect distinguishes the case in which the Government is plaintiff (*United States* v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (W.D.La.), affirmed *per curiam* by an equally divided court, 339 U.S. 940) from the present situation, since, in the former, not only does the choice of evils arise less fortuitously, but the election not to disclose leaves the public no worse off than if the action had never been brought.

III

The courts below erred in holding that respondents showed good cause for discovery, as required by Rule 34. The showing of cause was in general terms and the decision was based on the view that the taking of depositions and the use of other avail-

able discovery machinery would be too burdensome on respondents. Counterbalancing these factors, however, was the Government's offer to produce the survivors as witnesses at its own expense and at the respondents' convenience, and to guarantee their testifying on all but classified matters. Furthermore, where substantial reasons of public policy militate against disclosure, an even greater showing of cause than usual is required. Cf. *Hickman v. Taylor*, 329 U.S. 495. The importance of disclosure to the plaintiffs, who had other sources for the same information, is far less than the importance of the principle of deference to a well-founded claim of executive privilege.

ARGUMENT

This case presents the question whether the judiciary can compel executive officials to disclose, in the course of litigation, departmental documents which the officials believe should be withheld in the public interest. The court below, seeking to avoid this ultimate issue by formally disclaiming direct action against the official, has nevertheless erred in permitting an unwarranted encroachment upon the powers of the executive by penalizing the treasury of the United States. The effect of the decision below inevitably must be to exert coercive pressure on departmental officials to disclose documents and records, the disclosure of which they, as the responsible constitutional officers, have determined to be inimical to the public interest.

Our position is that under the doctrine of separation of powers and under the statute imple-

menting this doctrine the courts have no power to compel the heads of the executive departments to produce such documents, and that the attempt below to compel disclosure by offering the executive the Hobson's choice of producing, contrary to the public interest, or of suffering the public treasury to be amerced by judgment against the United States is likewise invalid. This position is based in part upon R.S. 161 (5 U.S.C. 22), which represents a legislative implementation of the doctrine of separation of powers. It is in part based upon the historic development of executive-judicial practice and on practical considerations of administration which underlie related doctrines of governmental privilege in the general law of evidence. It is also in part based on the total absence from the background and terms of the Tort Claims Act of any suggestion that Congress wished, if it could, to override this history, doctrine, and practice.

Aspects of the question presented here have recently been before this Court in *Touhy* v. *Ragen*, 340 U.S. 462, and in *United States* v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (W.D. La.), affirmed *per curiam* by an equally divided court, 339 U.S. 940, but both of these were significantly different. *Touhy* v. *Ragen* upheld the power of department heads to promulgate regulations pursuant to R.S. 161, similar to those in the present case, forbidding disclosures; but that case did not reach the question whether the courts had power to coerce the department head who promulgates such regulations to make disclosure. *Cotton Val-*

ley concerned the power of the courts to compel production of documents where the Government, acting through the department head involved, initiated the action. Without at all conceding that the District Court's decision in that case was correct, we may point out that where the Government is plaintiff, as in criminal cases where it is prosecutor,[4] the choice of seeking the aid of the courts by pursuing the action or of refusing to produce is different from that where the Government is defendant. If the Government refuses to produce in the former class of cases, it is denied judicial assistance; but the public is left in no worse position than if it had never instituted the action. Hence, the result in *Cotton Valley* does not reach the situation presented in the present case, where the public treasury is the actual defendant. Here, the executive does not choose to be sued in the particular case, and indeed the United States need never have consented to be sued at all; yet an election not to produce, made by the Secretary of the Air Force independently of the litigation, results in a substantial money penalty against the public treasury. The coercive effect of the alternative, though it may be somewhat less than that of compulsion by direct process against the executive officer involved, is still great enough to force production in all but the gravest of cases.

The court below read the Tort Claims Act and, through it, the Federal Rules as authorizing this coercion; but nothing in either the Act or the Rules can fairly be read as expressing an inten-

[4] See fn. 42, *infra*, p. 67.

tion to abrogate the express and long-standing privilege of the executive. Congress was cognizant of a long history—starting from the early days of the Republic—of conflict between the executive, on the one hand, and Congress and the courts, on the other, in which conflict the executive repeatedly asserted and vindicated its privilege. Beneath this history lay tacit assumptions of the nature of our form of government. It is most unlikely that Congress—aware as it was of this history and its assumptions—intended, without an express word in the Tort Claims Act or its legislative history, to punish the United States should the executive proceed in the historic way. And the Federal Rules make express provision for the very privilege here involved.

In this brief, we shall first show, from the source, history, and nature of the executive's assertion of power to determine the privilege for departmental documents, that the papers in question are privileged and that the courts lack power to compel their disclosure. Next, we shall show that nothing in the Tort Claims Act or the Rules of Civil Procedure confers on the courts the power to punish the United States by the means adopted below for the executive's assertion of this historic privilege, and that the decision below erroneously upholds an unwarranted interference with a privilege recognized by the Rules. Finally, we shall show that, apart from privilege, good cause for discovery has not been shown in the circumstances.

I

The Report of the Air Force Accident Investigation Board and the Statements of Witnesses Before the Board Are Privileged Against Discovery

Although the privilege asserted in this case has its ultimate source in the Constitution, it may be reached first at a lower level as a problem of statutory construction or of the common law of evidence. Federal Rule 34, *infra*, pp. 75-76, under which the District Court proceeded, authorizes a court to order production of documents and other tangible things "not privileged." Discovery under Rule 34 therefore does not extend to any matter which is privileged by the Constitution, by statute, or by the common law.[5] We shall show that the privilege claimed for reports of aircraft accident investigation boards, and for the testimony of witnesses before them, thus falls within the exception of Rule 34.

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[5] The term "privilege" in Rule 34 has primary reference to matters which fall within the scope of recognized evidentiary privileges such as the privilege against self-incrimination (based on the Constitution), that for communications between physician and patient (based on statute), or that for communications between husband and wife or attorney and client (based on the common law). However, privilege under Rule 34 is not limited to such recognized evidentiary privileges. See *Hickman* v. *Taylor*, 153 F. 2d 212, 222 (C.A. 3), affirmed, 329 U.S. 495. On the other hand, privilege does not extend to all matters incompetent as evidence for reasons (such as the hearsay rule) other than the recognized privileges. See *Hickman* v. *Taylor*, 329 U.S. at 511; *Bank Line Ltd.* v. *United States*, 163 F. 2d 133, 137 (C.A. 2). We think that the accident investigation reports here in question are both incompetent and privileged. Cf. *Chapman* v. *United States*, 194 F. 2d 974 (C.A. 5), now pending on petition for a writ of certiorari, No. 105, this Term. But we do not contend that they are privileged simply because they are incompetent.

A. *R.S. 161 Vests in the Secretary of the Air Force the Power to Determine Finally That the Documents in Question Are Privileged.*

R.S. 161, 5 U.S.C. 22, *infra*, p. 75, authorizes the head of each executive department "to prescribe regulations, not inconsistent with law, for * * * the custody, use, and preservation of the records, papers, and property appertaining to it." The Secretary of the Air Force has exercised this authority by promulgating Air Force Regulation No. 62-7, *infra*, pp. 78-81, pertaining to the records of accident investigations, which prohibits their disclosure by department personnel "without the specific approval of the Secretary."

Similar regulations, restricting various documents and records from disclosure except as authorized by the department head personally, have long existed in many executive departments and bureaus. Their validity under the statute has been completely established by *Boske* v. *Comingore*, 177 U.S. 459, and *Touhy* v. *Ragen*, 340 U.S. 462. These cases both held that the regulation provides a valid defense for an inferior officer of the department governed by it against punishment for defiance of a court order directing disclosure.[6] The question now to be considered is the question left open by

[6] Lower court cases taking the same view in related situations include the following: *Ex parte Sackett*, 74 F. 2d 922 (C.A. 9); *In re Valecia Condensed Milk Co.*, 240 Fed. 310 (C.A. 7); *Walling* v. *Comet Carriers*, 3 F.R.D. 442 (S.D. N.Y.); *Federal Life Ins. Co.* v. *Holod*, 30 F. Supp. 713 (M.D. Pa.); *Stegall* v. *Thurman*, 175 Fed. 813 (N.D. Ga.); *In re Lamberton*, 124 Fed. 446 (W.D. Ark.). *In re Weeks*, 82 Fed. 729 (D. Vt.), and *In re Huttman*, 70 Fed. 699 (D. Kans.) reached the same result before the decision in *Boske* v. *Comingore*.

Touhy v. *Ragen* (340 U.S. at 467, 470)—whether the department head who issues the regulation may personally decline to comply with an order directing disclosure.

Clearly, the regulation so contemplates. "Reports * * * will not be furnished * * * without the specific approval of the Secretary" (Section 5). "Responsibility for the release * * * will rest solely with the Secretary" (Section 6). The assertion of privilege made in the District Court was an exercise of that sole responsibility. Any attempt by a court to compel the Secretary to exercise this power in a manner prescribed by the court and contrary to his own judgment is a derogation from this power.

The regulation apart, the underlying statute confirms such a power in the department head. The court below appears to have thought erroneously that R.S. 161 has no application in cases where the courts, pursuant to their enforcement of provisions of substantive law, require the agency head to exercise his power under the regulation to authorize disclosure. But the history of R.S. 161 makes it clear that this statute is not merely a provision for the internal administration of government agencies. Rather, it was intended as a confirmation of independent authority, a statutory implementation of the constitutional independence of the executive.

1. *Privilege against demands by Congress.* R.S. 161 stems directly from the original organic acts establishing the executive departments (1 Stat. 28, 49, 65, 68, 553), and it embodies a recognition of their independence of both Congress and the

courts.[7] The privilege which it confers in this case derives from the same constitutional source as, and closely parallels, the executive privilege which has consistently and successfully been asserted in response to Congressional attempts to require production by the executive branch, often of the very type of documents involved in this case. Because of this close parallel, we wish to make some reference to the field of executive-legislative relations, before coming to the executive-judicial field. As we shall show, consideration of the former area casts light on the meaning and scope of R.S. 161.

There is further reason for referring in this case to the executive's privilege against the legislature.

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[7] Congressional independence as against the judiciary is also asserted. For a recent instance, see 96 Cong. Rec. 565-66 (H. Res. 427, 81st Cong., 2d Sess.): "* * * *Resolved*, That by the privileges of this House no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission * * *." 96 Cong. Rec. 1400; see on subsequent subpoena, H. Res. 465, 96 Cong. Rec. 1695; H. Res. 469, 96 Cong. Rec. 1765. Cf. *Trial of Thomas Cooper*, Wharton's State Trials of the United States 659, 662: "An application was made to the court to address a letter to the Speaker of the House, requesting him to have process served. This Judge Peters acceded to, as the proper course. It was refused, however, by Judge Chase, who ordered process to issue without such letter, saying, at the same time, that if it was necessary to compel the attendance of the members, the case would be continued until the session was over. The court at the same time refused to permit a subpoena to issue directed to the President of the United States. * * *

"* * * After some difficulty in obtaining the attendance of the members of Congress who were subpoenaed, *which appears ultimately to have been given under a waiver of the supposed privilege*; * * * the jury was sworn * * *." *Id.* at 662. Wigmore seeks to distinguish between the privilege against appearing to give testimony and the privilege against producing documents. See 8 Wigmore, *Evidence* (3d Ed. 1940) §§ 2367, 2371.

The reason is that the long history of assertions of executive privilege in this field has continually brought before the eye of the legislature the assumptions as to the nature of the separation of powers on which the executive's claims have been based. And it is not likely that Congress meant, *sub silentio,* in the Tort Claims Act to override these deep-rooted assumptions.

The frequently exercised, long-standing freedom of the executive to refuse Congress' demands for the production of documents does not require extended discussion. Under the Continental Congress, the relationship between legislature and executive had been modeled on the British system. The executive departments were, in effect, answerable to the legislature, and could be called on for an accounting. A resolution of the Continental Congress creating the Department of Foreign Affairs, whose head was appointed by and held office at the pleasure of Congress, provided:

> That the books, records and other papers of the United States, that relate to this department, be committed to his custody, to which, and all other papers of his office, any member of Congress shall have access; provided that no copy shall be taken of matters of a secret nature without the special leave of Congress. [22 *Journals of the Continental Congress* 87-92 (1782).]

The complete change wrought by the Constitution in establishing the three independent branches (The *Federalist*, Nos. XLVII, XLVIII) was reflected in R.S. 161 and its predecessors. See Wol-

kinson, *Demands of Congressional Committees for Executive Papers* (1949), 10 Fed. Bar J. 319, 328-330. We do not contend that this statute, the substance of which appears in the original organic act of each department, was an express enactment directed at *creating* an evidentiary privilege. Rather, it wove into the fabric of each department the premise of separation of powers on which the whole Government was formed.

Since then there has arisen an often asserted, much discussed, and well recognized privilege of the executive to deny Congress access to documents whenever either the President or the head of a department has deemed it in the public interest to do so. From the administration of Washington to the present, Presidents have repeatedly asserted the privilege, and, when forced to a showdown, Congress has always yielded and ceased to press its demands.[8] A recent instance was the refusal of

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[8] The following is a partial list of examples of successful assertions of the privilege, comprising partly assertions by the President and partly assertions by department heads (see *infra*, pp. 31-34):

President	Date	Type of Information Refused
Washington	1796	Instructions to U. S. Minister concerning Jay Treaty.
Jefferson	1807	Confidential information and letters relating to Burr's conspiracy.
Monroe	1825	Documents relating to conduct of naval officers.
Jackson	1833	Copy of paper read by President to heads of Departments relating to removal of bank deposits.
	1835	Copies of charges against removed public official.
		List of all appointments made without Senate's consent between 1829 and 1836, and those receiving salaries, without holding office.
Tyler	1842	Names of members of 26th and 27th Congress who have applied for office.

President Truman to turn over to the House Committee on Un-American Activities files relating to the federal employee loyalty program. Directive of March 13, 1948, 13 F.R. 1359.

Reference to the unbroken record of successful

President	Date	Type of Information Refused
Tyler	1843	Colonel Hitchcock's report to War Department dealing with alleged frauds practiced on Indians, and his views of personal characters of Indian delegates.
Polk	1846	Evidence of payments made through State Department on President's certificates, by prior administration.
Fillmore	1852	Official information concerning proposition made by King of Sandwich Islands to transfer Islands to U. S.
Buchanan	1860	Message of Protest to House against Resolution to investigate attempts by Executive to influence legislation.
Lincoln	1861	Dispatches of Major Anderson to the War Department concerning defense of Fort Sumter.
Grant	1876	Information concerning executive acts performed away from Capitol.
Hayes	1877	Secretary of Treasury refused to answer questions and to produce papers concerning reasons for nomination of Theodore Roosevelt as Collector of Port of New York.
Cleveland	1886	Documents relating to suspension and removal of 650 Federal officials.
Theodore Roosevelt	1909	Attorney General's reasons for failure to prosecute U. S. Steel Corporation.
		Documents of Bureau of Corporations, Department of Commerce.
Coolidge	1924	List of companies in which Secretary of Treasury Mellon was interested.
Hoover	1930	Telegrams and letters leading up to London Naval Treaty.
	1932	Testimony and documents concerning investigation made by Treasury Department.
Franklin D. Roosevelt	1941	Federal Bureau of Investigation reports.
	1943	Director, Bureau of the Budget, refused to testify and to produce files.
	1943	Chairman, Federal Communications Comm., and Board of War Communications refused records.
	1943	General Counsel, Federal Communications Commission, refused to produce records.
	1943	Secretaries of War and Navy refused to furnish documents, and permission for Army and Naval officers to testify.
	1944	J. Edgar Hoover refused to give testimony and to produce President's directive.

assertions of privilege in practice is particularly significant in this area of separation of powers. In the construction of any clause of the Constitution uninterrupted usage continuing from the early days of the Constitution would be significant. "Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation." *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-473; *United States* v. *Macdaniel*, 7 Pet. 1, 13-14. Here, moreover, because the doctrine of separation of powers is not contained in express language in the Constitution (see *Ex parte Grossman*, 267 U.S. 87, 119), and because the functioning of our Government depends so largely upon limits on the powers of each branch derived from practical adjustments based on a fair regard by each for the necessities

President	Date	Type of Information Refused
Truman	1945	Issued directions to heads of executive departments to permit officers and employees to give information to Pearl Harbor Committee, but the President's directive did not include any files or written material.
	1947	Civil Service Commission records concerning applicants for positions.

See Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 Fed. Bar J. 103, 147.

of the others, we think that the historic usage is especially meaningful. "Even constitutional power, when the text is doubtful, may be established by usage." *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 525.[9]

These successful executive assertions of privilege against Congress have frequently been acknowledged by Congress itself. See, *e.g.*, H. Rept. No. 1595, 80th Cong., 2d Sess., pp. 2-3, 7. Even in the heat of contest members of Congress have recognized the wisdom of acceding to the constitutional principles here asserted.

During the administration of President Hayes, for example, the House Judiciary Committee, under the chairmanship of Benjamin F. Butler, pointed out that all resolutions directed to the President relating to the production of records properly would contain the clause "if in his judgment not inconsistent with the public interest." H. Rept. No. 141, 45th Cong., 3rd Sess., p. 3. And the Committee continued (*id.* at pp. 3 and 4):

> * * * whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information. Indeed, upon principle, it would seem that this must be so. The Executive is as independent

[9] In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, the Court did not deny this principle but felt that sufficient practice had not been shown or that it had been changed by specific legislation.

> of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.

The decision as to whether there should be compliance with a particular request was the executive's, the committee stated:

> Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive department kept secret. The head of the executive department, therefore, must be the judge in such case and decide it upon his own responsibility to the people, and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, wilfully wrong, or to the detriment of the public interests.

There are many other instances of Congressional recognition of the executive privilege, *vis à vis* Congress, including one which gave rise to a great Congressional debate, occupying the Senate for almost two weeks, during President Cleveland's first administration. 17 Cong. Rec. 2211-2814. See Sen. Misc. Doc., Vol. 7, 52d Cong., 2d Sess., pp. 235-243; 8 Richardson, *Messages and Papers of the Presidents*, pp. 375-383; 17 Cong. Rec. 4095. In the course of this debate many past examples of executive refusals to produce papers demanded by

Congress were discussed. See, *e.g.*, 17 Cong. Rec. 2622-2623.[10]

Particularly illuminating is Congress's reaction to the President's Directive of March 13, 1948 (13 F.R. 1359), relating to the loyalty program. At that time, a joint resolution was introduced (H.J. Res. 342, 80th Cong., 2d Sess.) purporting to direct all executive departments and agencies to make available to Congressional committees any information deemed necessary to the committees for the performance of their work.

This resolution was opposed on the ground that it was unconstitutional. A strong minority report was filed in the House, which stated in part:

> The majority report recognizes that this issue between the executive and the legislative branch is not a new one, but has been raised periodically, over the entire history of our Government and without regard to the political affiliations of the respective Presidents or the political complexions of the Congresses whose authority in this regard the Presidents challenged. There can be no disputing this fact. There have been made from time to time over the period of our country's history requests and demands upon the executive branch of our Government by the Congress or its committees seeking information, to reveal which, in the opinion of the executive branch, would have been inconsistent with its duties in this

[10] This debate ended with the approval by the Senate, in a vote on party lines, of resolutions condemning the President and the Attorney General. No result came from the resolutions. See 17 Cong. Rec. 2813-2814.

> regard. On such occasions the executive branch, as a matter of history, as a matter of tradition, and as a matter of constitutional prerogative, has declined to comply with such requests or demands. Over the years, President after President has asserted his prerogative in this respect. By now it is well established that under our tripartite form of government neither the legislative nor the judicial branches may question the Executive with respect to matters within his province and as to which he, the Executive, determines that response to the questions would be contrary to the public interest. [H. Rept. No. 1595, 80th Cong., 2d Sess., p. 7.]

The resolution was ultimately passed by the House but died in the Senate Committee on Expenditures in the Executive Departments. Thus, Congress forebore to assert directly even for its own purposes what the court below contends it has asserted indirectly for private litigants.

2. *Privilege against demands by courts.* While it may be suggested that there are differences in the force of the privilege when it touches the interest of parties to a judicial proceeding, as compared with the executive's relations with Congress,[11] we

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[11] But see the views of Senator Jackson, later to become an associate Justice of this Court (17 Cong. Rec. 2623):

"Sir, has this body, has the Congress of the United States any more authority over papers in the Executive Department of this Government than the co-ordinate independent branch of the Government—the judiciary? The judicial department of this Government has as much power and authority over all papers in the hands of the Executive or in any Department as the entire Congress has. When the rights of in-

think that the history in the two fields is so interwoven as to make the parallel apt. The executive's claim of independence of the courts is well established; and although occasions for its assertion have been less frequent than those against Congress, the pattern is clear.

Reference has already been made to this Court's decision in *Boske* v. *Comingore*, 177 U.S. 459, and the cases in which it has been followed. These establish the executive's power to refuse disclosure at least until demand is made by the courts on the department head himself.[12] And, to the extent that courts have dealt with the problem, the power of the executive department head has been asserted and acknowledged. In *Marbury* v. *Madison*, 1 Cranch 137, Attorney General Lincoln, appearing as a witness, objected to answering certain questions concerning the disposition of Marbury's commission. "On the one hand, he respected the

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dividuals, affecting their life, liberty, or property, are pending before the courts, the judicial department has as much power over papers as the Senate or the whole Congress; and yet it has been universally recognized from the very foundation of this Government that the judicial department of the Government can not call for papers and procure them either from the President or the head of an Executive Department at its own will, but that the discretion rests with the Executive and with the Departments how far and to what extent they will produce those papers."

[12] Though this Court, in the *Boske* case, seemed to stress the power of the department head to center the responsibility for disclosure in himself, it characterized as "elaborate and able" (177 U.S. at 467) the district court's opinion which goes on much broader grounds. The lower court appears to have been of the view that not even the Secretary of the Treasury could be compelled to produce the documents. See *In re Comingore*, 96 Fed. 552, 562 (D. Ky.).

jurisdiction of this court, and on the other, he felt himself bound to maintain the rights of the executive." 1 Cranch at 143. The Court said, "They had no doubt he ought to answer. There was nothing confidential required to be disclosed. *If there had been, he was not obliged to answer it; and if he thought that anything was communicated to him in confidence, he was not bound to disclose it* * * *." 1 Cranch at 144 (italics supplied). Lincoln at a later time answered substantially all of the questions. 1 Cranch at 145.

When sitting on Burr's trial, Chief Justice Marshall issued a subpoena to President Jefferson for the production of a letter sent by General Wilkinson to the President, which Burr alleged contained information vital to his defense. Jefferson ignored the subpoena and directed the United States Attorney to produce only such portions of the letter as were not confidential. 1 Robertson, *Burr's Trials* 177, 180, 186-188 (1808); 1 Dillon, *Marshall: Life, Character, Judicial Services* XLVI-XLIX (1903); 9 Ford, *Writings of Thomas Jefferson* 55-57, 62 (1898). The court avoided the ultimate test of power with the executive.

After Burr was acquitted of treason, he was tried again on a statutory charge. Again he demanded the Wilkinson letters, and United States Attorney Hay insisted that some of the matter in the letters ought not to be disclosed. At one point Hay intimated that he would show the letter to the court and not to the defendant, but at another he inti-

mated that he would ignore a subpoena *duces tecum*. 2 Robertson, *Burr's Trials* 511. Jefferson also wrote to Hay, saying that if the Chief Justice sought to issue a subpoena, the United States marshal would be wise not to try to enforce it, and that he, Jefferson, would protect the marshal. 9 Ford, *Jefferson's Writings* 62. Of especial significance for this case is the fact that it appears that the privilege was available not only to the President but also to department heads. Apparently the subpoena issued from the district court was directed to both the President and the Secretaries of War and the Navy. Neither attended, and Jefferson stated that the only information within their knowledge that would be given to the court, he himself would give on deposition.[12a]

Every Attorney General considering the problem has been of the opinion that information of which disclosure would be detrimental to the public interest is privileged, and that the determination of the executive is conclusive. 11 Ops. A.G. 137, 142-143; 15 Ops. A.G. 378; 16 Ops. A.G. 24;

[12a] "In no case of this kind would a court be required to proceed against the president, as against an ordinary individual. The objections to such a course are so strong and so obvious; that all must acknowledge them." Chief Justice Marshall in 2 Robertson, *op. cit. supra*, p. 536. Burr's trial is the only case in which a court has issued a subpoena to the President. In other cases even the issuance of the subpoena, either to the President or to department heads, has been refused. *E.g., Trial of Thomas Cooper*, Wharton's State Trials of the United States 659, 662; *Smith's & Ogden's Trial*, Lloyd's Rep. 2, 7, 13, 89.

25 Ops. A.G. 326; 40 Ops. A.G. 45, 49.[13] Attorney General Jackson has said (40 Ops. A.G. 45, 49):

> This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine. *Marbury* v. *Madison*, 1 Cranch 137, 169; *Totten* v. *United States*, 92 U.S. 105; *Kilbourn* v. *Thompson*, 103 U.S. 168, 190; *Vogel* v. *Gruaz*, 110 U.S. 311; *In re Quarles and Butler*, 158 U.S. 532; *Boske* v. *Comingore*, 177 U.S. 459; *In re Huttman*, 70 Fed. 699; *In re Lamberton*, 124 Fed. 446; *In re Valecia Condensed Milk Co.*, 240 Fed. 310; *Elrod* v. *Moss*, 278 Fed. 123; *Arnstein* v. *United States*, 296 Fed. 946; *Gray* v. *Pentland*, 2 Sergeant & Rawle's (Pa.) 23, 28; *Thompson* v. *German Valley R. Co.*, 22 N.J. Equity 111; *Worthington* v. *Scribner*, 109 Mass. 487; Ap-

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[13] Accord: American Law Institute, *Model Code of Evidence* (1942), Rule 288; 1 Greenleaf, *Evidence* (1899 Ed.), Sec. 251; 3 Jones, *Evidence* (4th Ed., 1938) Sec. 762. See also the cases cited in fn. 41, *infra*, p. 66. Wigmore has been of the contrary view (8 Wigmore, *Evidence* (3d Ed. 1940) Sec. 2378a) since 1905 (1905 Ed., Sec. 2375)), although he recognizes a privilege for communications by informer and a limited class of state secrets, not clearly defined.

peal of Hartranft, 85 Pa. 433, 445; 2 *Burr Trials*, 533-536; see also 25 Op. A.G. 326.[14]

Viewed in the light of this long history of executive independence in practice, and of the courts' and Congress's recognition of this principle, R.S. 161 can only be read as a statutory embodiment and recognition of the authority of the department heads to formalize the procedure whereby they determine, in the discharge of their duties, what to disclose and what to withhold. We turn now to additional considerations of public policy, recognized by the common law, which support this view of the law and which privilege the documents against discovery.

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[14] "* * * Such order ought not to be made against the Executive of the state, because it might bring the Executive in conflict with the judiciary. If the Executive thinks he ought to testify, in compliance with the opinion of the court, he will do it without an order; if he thinks it to be his official duty, in protecting the right and dignity of his office, he will not comply even if directed by an order * * *." *Thompson v. German Valley Railroad Co.*, 22 N.J. Eq. 111, 114.

"* * * [T]he President of the United States, the governors of the several states and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, *in their own judgment*, the disclosure would, on public grounds, be inexpedient: 1 Greenf. on Ev., § 251; 1 Whart. Law of Ev., § 604. Thus, the question of the expediency or inexpediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession * * * as judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent * * *." *Appeal of Hartranft*, 85 Pa. 433, 445, 447 (italics supplied).

B. *The Power of the Secretary to Determine Finally That the Documents in Question Are Privileged Is Supported by Considerations of Public Policy Recognized by the Common Law.*

In determining what materials are "privileged" within the meaning of Rule 34, reliance may be placed not only on privilege based on the Constitution and statute, as has been done so far in this brief, but also on privilege based on considerations of public policy expressed in the common law. State statutes and decisions and cases in other jurisdictions help to articulate these considerations. Among the categories of public policy recognized in this way by the law are the interest in efficient administration free from interference; the interest in secrecy in matters of foreign policy, security and national defense;[15] the interest in protecting communications of informants to officials;[16] and the interest in shielding witnesses from undue influence before trial; as well as the constitutional doctrine of separation of powers with

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[15] Thus, in actions between private parties, Government officials as witnesses have asserted a privilege against disclosure of confidential military matter. The privilege is the Government's, not the party's. *Firth Sterling Steel Co.* v. *Bethlehem Steel Co.*, 199 Fed. 353 (E.D. Pa.); *In re Grove*, 180 Fed. 62 (C.A. 3); *Pollen* v. *Ford Instr. Co.*, 26 F. Supp. 583 (E.D. N.Y.). Compare *Totten* v. *United States*, 92 U.S. 105, in which an action on a contract for espionage made with President Lincoln was held not to lie, on the ground that such a contract was so confidential that public policy would not permit action to be brought on it.

[16] See *infra*, p. 43.

which the preceding subsection of this brief was largely concerned.[17]

1. *State statutes and common law decisions:*— The privileged nature of information acquired by public officials has been recognized by the states in a variety of statutes protecting the confidence of communications or government documents. Some fourteen states have enacted statutes providing in general terms that a public officer cannot be examined as to communications made to him in official confidence, when the public interest will suffer by disclosure.[18] In addition, many statutes dealing with narrower classifications of official information have been enacted; among these are statutes relating to police reports of highway accidents, tax returns, reports submitted in compliance with banking loans, health reports, and many others.[19]

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[17] President Truman's Directive of March 13, 1948, forbidding disclosure of records of the employee loyalty program, relied on a number of these grounds. The Directive recited that "This is necessary in the interest of our national security and welfare, to preserve the confidential character and sources of information furnished, and to protect Government personnel against the dissemination of unfounded or disproved allegations." 13 F. R. 1359.

[18] Calif. Code Civ. Proc. Ann. § 1881 (5) (1941); Idaho Code Ann. § 9-203 (1948); Code of Iowa § 622.11 (1946); Minn. Stat. Ann. § 595.02 (5) (West 1947); Mont. Rev. Code Ann. § 10536 (5) (1935); Neb. Rev. Stat. § 25-1208 (1948); Nev. Comp. Laws Ann. § 8975 (1929); N. D. Rev. Code § 31-0106 (1943); Ore. Comp. Laws Ann. § 3-104 (5) (1940); S. D. Code § 36.0101 (5) (1939); Utah Code § 104-49-3 (1943); Wash. Rev. Stat. Ann. § 1214 (5) (1932); and see Colo. Stat. Ann. Ch. 177 § 9 (1949); Ga. Code Ann. § 38-1102 (1937).

[19] For a general survey and discussion of state legislation, see Sanford, *Evidentiary Privileges against the Production of Data Within the Control of Executive Departments*, 3 Vanderbilt L. Rev. 73, 82 (1949); Note, 165 A.L.R. 1302.

The validity of such legislation forbidding disclosures of information by public officials has been upheld by the state courts.[20] The variation in wording and coverage of particular statutes prevents any generalization as to the scope and effect of such legislation. It may be said, however, that the widespread pattern of legislation imposing restrictions upon free disclosures of this type of information indicates an accepted public policy as well as a recognition of the principles of the earlier court decisions and of the traditional American doctrine that the executive is independent.

Great weight should also be given to the decision in *Duncan* v. *Cammell, Laird & Co.*, [1942] A.C. 624, in which the House of Lords reached the result urged by the Government here. In that case, which arose out of the sinking of the submarine *Thetis*, discovery was sought of the plans and construction contracts of the submarine. The House of Lords held that discovery could not be obtained. "The principle to be applied in every case is that documents otherwise relevant and liable to production

[20] *Appl. of Manufacturers Trust Co.*, 269 App. Div. 108, 53 N.Y.S. 2d 923 (1945); *Oklahoma Tax Comm.* v. *Clendinning*, 193 Okla. 271, 143 P. 2d 143 (1943); *Hickok* v. *Margolis*, 221 Minn. 480, 22 N.W. 2d 850 (1946); *Fleming* v. *Superior Court*, 196 Cal. 344, 238 Pac. 88 (1925); *Thaden* v. *Bagan*, 139 Minn. 46, 165 N.W. 864 (1917); *Peden* v. *Peden's Adm'r.*, 121 Va. 147, 92 S.E. 984 (1917); *In re Herrnstein*, 20 Ohio Ops. 405, 6 Ohio Supp. 260 (1941); *Maryland Casualty Co.* v. *Clintwood Bank*, 155 Va. 181, 154 S.E. 492 (1930); *Samish* v. *Superior Court*, 28 Cal. App. 2d 685, 83 P. 2d 305 (1938); *Leave* v. *Boston El. Ry. Co.*, 306 Mass. 391, 28 N.E. 2d 483 (1940); *Dwelly* v. *McReynolds*, 6 Cal. 2d 128, 56 P. 2d 1232 (1936); *Simonsen* v. *Barth*, 64 Mont. 95, 208 Pac. 938 (1922). Contra: *In re French*, 315 Mo. 75, 285 S.W. 513 (1926).

must not be produced if the public interest requires that they should be withheld." [1942] A.C. at 636. And the sole arbiter of when the public interest so requires is the cabinet minister who heads the department to which the documents belong. Although the action was between private parties, the Lords held that no distinction was to be made, for suits against the Government, and in fact stated that when the Crown is a party it may not be required to give discovery at all. [1942] A.C. at 632.[21]

The House of Lords looked carefully into the question whether the departmental determination should be conclusive. The judgment of the Lord Chancellor (Viscount Simon), speaking for all the Law Lords, said ([1942] A.C. 624, 638):

> The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, *e.g.*, departmental minutes, to which they belong.

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[21] "The importance of *Duncan* v. *Cammell, Laird & Co.* * * * is marked by the fact that seven members of the House of Lords sat to hear the appeal. Moreover, the unusual course was followed of delivering only a single judgment which was prepared by the Lord Chancellor after 'consultation with and contribution from' the other learned Lords." 58 L.Q. Rev. 436. The decision disapproves the decision of the Judicial Committee of the Privy Council in *Robinson* v. *State of South Australia*, [1931] A.C. 704.

And, after reviewing the cases, and quoting among others the statement of Lord Kinnear in *Admiralty Commissioners* v. *Aberdeen Steam Trawling & Fishing Co.*, [1909] Sess. Cas. 335—"A department of Government to which the exigencies of the public service are known as they cannot be known to the Court, must, in my judgment, determine a question of this kind for itself * * *,"[22]—the Lord Chancellor states that the executive determination of privilege is conclusive on the court.

The Lord Chancellor goes on to lay down standards on which the minister should base his executive determination, mentioning, among others, situations where "disclosure would be injurious to national defence * * *" or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service." [1942] A.C. at 642.[23] These are the factors on which

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[22] Compare *Rex* v. *Davies*, [1945] 1 K.B. 435, 442 (Humphreys, J.): "* * * I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and * * * it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty * * *" (Oliver, J.): "* * * the judge who, after hearing the statements, has to pronounce sentence, may, quite unconsciously, have his judgment influenced by matters which he has no right to consider. * * *"

[23] "In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objecting to production. It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential.' It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials

the Secretary made his determination in this case. See R. 22.

The Lords' final conclusion was that:

> When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. * * * After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.

The constitutional and public policy considerations which underlie the result in *Duncan* v. *Cammell, Laird & Co.*, have, we submit, even greater significance in the present case than in the English case, because the English constitution does not embody the doctrine of separation of powers and there

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who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service." [1942] A.C. at 642.

is no extensive history of executive independence like that we have discussed in the preceding subsection. None of these difficulties would confront an English court seeking to require disclosure. Hence —contrary to the view of the court below (see R. 56)—we think that the present case is *a fortiori*.[24]

In this case, there are also two more-specific privileges, universally admitted to be recognized by the common law, which support the Secretary's power to refuse to produce the documents even for the judge alone. The first is the so-called "state secrets" privilege; the other is the privilege against disclosing the identity of informers.

Even Wigmore, the doughtiest opponent of executive privilege, affirms that there is a common law privilege for matters concerning military or international affairs. 8 Wigmore, *Evidence* (3rd ed, 1940) §§ 2378-2378a, pp. 785, 789.[25] See *Totten* v. *United States*, 92 U.S. 105, 107, and cases cited in fn. 15, *supra*, p. 36. The Secretary's claim of privilege in the District Court falls squarely under that category, for he based his claim, in part, on the fact that the aircraft was engaged "in a highly secret military mission" and, again, on the "reason

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[24] The *Duncan* decision occasioned considerable comment, both pro and con (compare 193 L.T. 224; 21 Can. Bar Rev. 51; 58 L.Q. Rev. 31, with 58 L.Q. Rev. 436; 59 L.Q. Rev. 102; 20 Can. Bar Rev. 805); but when the Crown Proceedings Act, 1947, 10 and 11 Geo. 6, C. 44, § 28, authorized discovery against the Crown for the first time, it exempted any document which would, in the opinion of a Minister, be injurious to the public interest to disclose, and specifically provided for the right of the Minister to deny the very existence of such a document.

[25] Wigmore seems, however, to place in the courts the determination of whether military matters are actually involved. See Sec. 2379.

that the aircraft in question together with the personnel on board, were engaged in a highly secret mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest" (R. 22). This comment was made with respect both to the statements of witnesses and to the investigating board's report (R. 22).

The so-called informer's privilege is equally well established. The Government need not disclose the identity of criminal informers. *E.g.*, 8 Wigmore, *Evidence* (3d Ed. 1940) § 2374; *United States* v. *Moses*, Fed. Cas. No. 15825; *Mitrovich* v. *United States*, 15 F. 2d 163 (C.A. 9); *Segurola* v. *United States*, 16 F. 2d 563 (C.A. 1); *United States* v. *Li Fat Tong*, 152 F. 2d 650 (C.A. 2); *Trial of Thomas Hardy*, 24 How. State Tr. 199. This Court has recognized this privilege and applied it not only as to the identity of the informer but as to the contents of his statement. *Vogel* v. *Gruaz*, 110 U.S. 311; see *In re Quarles & Butler*, 158 U.S. 532, 535-536; accord, *Worthington* v. *Scribner*, 109 Mass. 487; *Gray* v. *Pentland*, 2 S. & R. 23 (Pa.). Contra: 8 Wigmore, *loc. cit. supra*. It is little or no extension of this common law rule to apply it so as to maintain secrecy for witnesses who might otherwise be reluctant to make statements to an investigating board inculpating themselves or their colleagues. See also *infra*, pp. 44-47, 49-50.

2. *Public policy considerations:*—This position is strengthened, we believe, by more detailed con-

sideration of some of the factors that underlie these common law privileges and which would militate against disclosure if the question were before the courts as an initial matter for their own determination. One of these factors, to which the Secretary pointed in the present case, is, of course, the desire to encourage the freest possible discussion before the Air Force Investigation Boards by the survivors of accidents. As the Secretary points out (R. 22), the purpose of the investigations is the development of flying safety measures. The informer's privilege discussed above (*supra*, p. 43) indicates the value placed by the law on maintaining secrecy for witnesses who might otherwise be reluctant to make statements inculpating themselves or others. The particular importance to the Air Force of completely protecting those who make important disclosures is emphasized by Amended A.F. Regulation No. 62-14A, which provides that the witnesses should be told that the investigation is not for disciplinary purposes.[26] The promotion of free disclosure, forming as it does the basis for the frequently applied common law rule, should, as we noted above (p. 43), also serve as a basis for extending the privilege from disclosure to

[26] "Purpose and Nature of Investigation: a. Witnesses appearing before an aircraft accident investigating board or officer conducting an investigation required by this Regulation will be advised:

(1) That the purpose of the investigation is to determine all factors in connection with the accident and to prevent a recurrence of the accident in the interest of flying safety.

(2) That it is not for the purpose of obtaining evidence for disciplinary action, for determining liability or line-of-duty status, or for reclassification.

(3) That it is not conducted under the 70th Article of War."

the circumstances of this case, even if it were considered as falling within the judicial orbit.

In regard to the report of the Accident Investigation Board, the policy factors are more complex. To the extent that the report may discuss the witnesses and their statements to the Board, the considerations just discussed are of course relevant. Also, to the extent that the report reveals military secrets concerning the structure or performance of the plane that crashed or deals with these factors in relation to projected or suggested secret improvements it falls within the judicially recognized "state secrets" privilege. See *supra*, pp. 42-43.

Beyond this, the factors militating against revelation of these reports are at least as strong as, and in our view considerably stronger than, those which have always caused Congress to recognize a privilege against disclosure in instances where the problem of disclosure of accident board reports has been specifically raised. As early as a 1910 amendment to the Interstate Commerce Act, Congress recognized the importance to effective federal accident investigation in the railroad field of shielding accident investigation reports against *use* (not merely admission into evidence) in litigation. 36 Stat. 351, 45 U.S.C. 41.[27] The House Committee which recommended this legislation stated:

> Your committee believes that if this bill passes and the authority provided in section 3 is given to the commission, thorough and care-

[27] "Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation."

> ful investigations will be made, and as by section 4 of the bill neither the report made by the company nor the report of the investigation made by the commission are to be admitted as evidence or for any purpose in any suit or action for damages, it will be possible to secure full and complete testimony of all the facts connected with any given accident. [H. Rept. No. 36, 61st Cong., 2d Sess., p. 3.]

A comparable protection recognized for Civil Aeronautics Board investigation reports furnishes a more recent instance of the same policy.[28] See *Universal Airline, Inc.* v. *Eastern Air Lines*, 188 F. 2d 993 (C.A. D.C.).[29]

That Congress has not adopted a comparable provision for the Air Force, probably because the matter was not called to its attention, should not prevent the courts from themselves recognizing a similar bar to use of board reports on Air Force accidents, or at least from permitting the Secretary of the Air Force to establish a comparable rule

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[28] Section 701 of the Civil Aeronautics Act provides in part as follows: "The records and reports of the former Air Safety Board shall be preserved in the custody of the secretary of the Civil Aeronautics Board in the same manner and subject to the same provisions respecting publications as the records and reports of the Authority, except that any publication thereof shall be styled 'Air Safety Board of the Civil Aeronautics Authority', and that no part of any report or reports of the former Air Safety Board of the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." 52 Stat. 1012, as amended, 49 U.S.C. 581.

[29] But *cf. Pekelis* v. *Transcontinental & Western Air, Inc.*, 187 F. 2d 122 (C.A. 2), certiorari denied, 341 U.S. 951 (investigation reports of commercial airline admissible).

for Air Force casualties. Certainly, there is greater reason for non-disclosure of government reports of military crashes than in the case of commercial airline accidents.

C. *Even if a Department Head's Refusal to Produce Might be Reviewable in other Circumstances, there is no Occasion Here to Review or Disturb the Secretary's Determination.*

Our central position is that the power of determination is the Secretary's alone. This position is based, as we have shown, on the constitutional and statutory history of the executive's privilege. It is also based on the common law and on reasons of policy arising from the fact that the department head alone is truly qualified and in a position to make the determination. *Supra,* pp. 19-47. But we also take the view that even if there resides in the judiciary some residual power to review and reject a department head's refusal to produce, there is no occasion here to review or disturb the Secretary's determination.

As the House of Lords pointed out in the *Conmell, Laird* case, only the department head knows the exigencies of the public service; only widely separated portions of Air Force policy can come into overt consideration in a given litigation; and the fitting together of the scattered pieces can be accomplished only in the day to day decisions of the agency.[30] Similar reasons have underlain the

[30] See *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U.S. 585; *Perkins* v. *Endicott Johnson Corp.*, 128 F. 2d 208 (C.A. 2),

frequent decisions of Congress to delegate the delineation of legislative policy to administrative agencies, as it has done in R.S. 161 with regard to departmental documents. Factors motivating a congressional hands-off policy in so many areas should be recognized by the courts in this field, even if it were to be assumed, as it was by the district judge, that some power to overturn the invocation of governmental privilege lodged in the courts.

Carrying out the analogy, where Congress has delegated responsibility to an administrative agency, the day by day decisions of the agency in carrying out that responsibility have been traditionally not judicially reviewable on a claim of mere error.[31] Cf. *Adams* v. *Nagle*, 303 U.S. 532,

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affirmed, 317 U.S. 501. In the *Chicago B. & Q. Ry. Co.* case, Mr. Justice Holmes said (204 U.S. 585, 598):

> * * * But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth. The Board was created for the purpose of using its judgment and its knowledge. [Citations omitted.] Within its jurisdiction, except, as we have said, in the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The State has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. * * *

[31] "Courts are not the only agency of government that must be assumed to have capacity to govern. * * * [I]nterpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of our three branches of government * * * is far more likely, in the long run, 'to obliterate the constituent members'

540-541, 542; *Decatur* v. *Paulding*, 14 Pet. 497, 516. The heavy responsibilities that befall any department head in carrying out his official duties can hardly be met unless they are accompanied by a substantial amount of freedom in determining departmental policies."[32]

The responsibilities attaching to the office of the Secretary of the Air Force are especially grave in these times of uncertain world conditions. It is universally recognized that airpower plays an important role in the defense of the nation. And it is equally clear that an essential factor in the maintenance of aerial supremacy is the constant effort to improve aircraft from all technological standpoints including that of safety of operation.

The Secretary of the Air Force has determined that it is necessary to conduct investigations "to determine all factors in connection with the accident [involving aircraft] and to prevent a recurrence of the accident in the interest of flying safety." A.F. Regulation 62-14A. He has further determined that, in order to obtain the full disclosure from witnesses before the Aircraft Accident Board which is necessary to accomplish this objective, certain controls must

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of 'an indestructible union of indestructible states' * * *" Mr. Justice Stone dissenting in *United States* v. *Butler*, 297 U.S. 1, 87-8; cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 146; *Decatur* v. *Paulding*, *supra*, at p. 515.

[32] This is especially true in the military area where the Secretaries are the alter ego of the President. "An army is not a deliberative body. It is the executive arm." *In re Grimley*, 137 U.S. 147, 153.

be imposed on the use made of the Board reports. Accordingly, A.F. Regulation 62-7 provides that these reports will not be furnished to persons outside the authorized chain of command without the specific authority of the Secretary of the Air Force and that these reports will be classified no lower than "Restricted." A.F. Regulation 62-14A directs the investigating board or officer to advise witnesses of the single purpose of the investigation. It further decrees that the report of investigation and attachments "will not be used in any manner in connection with any investigation or proceeding leading toward disciplinary action, determination of pecuniary liability or line-of-duty status, or reclassification."

It seems difficult to question the correctness of the Secretary's conclusion, in his claim of privilege, that "The disclosure of statements made by witnesses and air-crewmen before Accident Investigation Boards would have a deterrent effect upon the much desired objective of encouraging uninhibited admissions in future inquiry proceedings instituted primarily in the interest of flying safety" (R. 22). And it must be remembered that the Secretary's decision on this aspect of his claim of privilege was made, not in terms of this particular litigation, but in the light of factors entirely independent of this particular aircraft and the contents of this particular report of investigation. The pertinent Air Force regulations, discussed above, were grounded on considerations applicable to all investigations of military aircraft accidents and the force of these regulations is not al-

tered either by a specific witness's testimony or by the conclusions arrived at by the Accident Investigation Board on a given occasion. To question this determination necessarily involves weighing the pros and cons of disclosure of official military documents and affairs without an intimate knowledge of the needs of the military establishment. In the absence of compelling evidence to the contrary, it can be presumed that the Secretary has given full consideration to the problems involved in civil litigation, has weighed the possible hardships to plaintiffs, and has made a responsible decision in the light of the adverse effects of nondisclosure. Having performed his duties in accordance with the mandate of Congress, his judgment should be taken as conclusive. The courts "should not overrule an administrative decision merely because they disagree with its wisdom." *Radio Corporation of America* v. *United States*, 341 U.S. 412, 420.[33]

Recognition that only the executive is in a posi-

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[33] "The secretary of war is the regular constitutional organ of the president, for the administration of the military establishment of the nation; and rules and regulations publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority. *Such regulations cannot be questioned or denied, because they may be thought unwise or mistaken.*" *United States* v. *Eliason*, 16 Pet. 291, 302 (italics supplied); cf. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, 94; *United States* v. *George S. Bush & Co.*, 310 U.S. 371, 380; *Gray* v. *Powell*, 314 U.S. 402, 412; *Securities and Exchange Commission* v. *Central-Illinois Securities Corporation*, 338 U.S. 96, 126; *American Power Company* v. *Securities and Exchange Commission*, 329 U.S. 90, 118.

tion to estimate the full effects of such disclosure is a weighty reason for upholding the Secretary's claim in this case. The problem here is clearly an administrative one; and, unless the courts are to interfere in the administration of Government, they must trust in the judgment of the appointed administrator where, as in this case, it is plain on the face of the record that he acts within the sphere of administration and not for extra-administrative motives which should not be his concern.

II

The Court Below Erred in Permitting the Executive Privilege Against Disclosure to Be Circumvented by Finding a Waiver of the Privilege in the Tort Claims Act and Federal Rules of Civil Procedure

What we have said so far indicates that the Secretary has the power to refuse or ignore any demand or coercive order for production of these documents addressed by the court to him personally. With this as a premise, we come to examine the error in the position of the court below in seeking to exclude this power from consideration in this case. That court took the view that there was no conflict between the power of the Secretary to refuse a direct demand and the power of the court to impose its will by means of an order directed to the United States and carrying with it the sanction of denying the Government the opportunity to present evidence on the merits of the litigation.

At the outset, we must clear away the primary error in this conclusion which is revealed by the statement that the court's only concern in this case

is "with ascertaining the legal duty of the Secretary * * * to make the requested discovery," and not with the propriety of an action directed against the Secretary's person (R. 50). This view appears to be based on the concept that the Secretary's "legal duty" exists apart from the court's power to reach him by subpoena or other direct order. But the considerations of history and public policy discussed in the preceding section of this brief indicate that the court's lack of power to subpoena the executive is more than a mere bowing to the recognition that in any show of naked force the executive would probably win. Whether or not such a recognition lies at the bottom of some of the constitutional, statutory, and common law principles discussed, nevertheless, above and beyond this, these principles have become a part of the Constitution, of the law, and of the tacit assumptions on which the governing process has proceeded. The result is that the Secretary, in making his determination not to disclose, was carrying out his legal duty, not subverting it.[34] He was carrying out the duty entrusted to him by the law to make a deter-

[34] It may be presumed that public officials perform their duties conscientiously. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15; cf. *R. H. Stearns Co.* v. *United States*, 291 U.S. 54, 63-64; *Wilkes* v. *Dinsman*, 7 How. 89, 130. Our tripartite form of government of its very nature requires that presumption. In the words of Mr. Justice Holmes, quoted recently by Mr. Justice Frankfurter: "Universal distrust creates universal incompetence." *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U.S. 180, 185. If the judiciary were to act on the premise of executive misfeasance or incompetence, the consequence would be the weakening of the executive and, therefore, of our tripartite sytem.

mination whether the public interest would be better served by disclosing the documents or by withholding them. And, in so doing, he may be deemed to have considered the plaintiffs' interest in a fair trial as well as the Air Force's interest in protecting its secrets. "After all the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation." *Duncan* v. *Cammell, Laird & Co.*, [1942] A.C. 624, 643.

Once it is recognized that the duty of appraising all relevant considerations resides in the Secretary, and not in the court, it becomes clear that the course adopted by the District Court and approved by the court below was improper. What the court may not do by direct order, it may not do by conditional order. It may not make the Secretary's determination whether to withhold disclosure conditional upon the entry of a large judgment against the Government in the event that he does so determine. To do so would in effect subject the United States to a penalty, which may not be done, at least in the absence of express legislative mandate. And, contrary to the view of the court below, we think it clear that Congress has not attempted to do so.

In this section, we shall elaborate the reasons for these views. We shall begin by showing that nothing in the Tort Claims Act, on which the court be-

low relied, imposes on the department head a "legal duty" of making disclosure on pain of subjecting the United States to judgment if he refuses. Indeed, as we shall show, the Federal Rules forbid such a result and make available an alternative course which the District Court should have pursued.

A. *Nothing in the Tort Claims Act or Federal Rules Imposes on the Department Head Any Duty of Disclosure.*

Section 410 of the Federal Tort Claims Act (28 U.S.C. 1346, 2674) provides that "the United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances." Also, the Federal Rules of Civil Procedure are made applicable to all suits under the Tort Claims Act. *United States* v. *Yellow Cab Company*, 340 U.S. 543, 553. The court below held that these provisions permitted the discovery order, under Rule 34, and also the sanction imposed by the District Court, holding that the order taking the issue of negligence as found against the Government was provided for by Rule 37(b)(2), *infra*, pp. 76-77. Rule 37(b)(2) states in part:

> If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document * * * the court may make such orders in regard to

the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses * * *.

It may be conceded that both the Tort Claims Act and the Federal Rules were intended to make the discovery procedure of Rules 26-27 applicable generally to the Government,[35] and that the

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[35] Section 411 of the Tort Claims Act (60 Stat. 844, 28 U.S.C. (1946 ed.) 932), as originally enacted, provided expressly that the Rules of Civil Procedure should apply to suits under the Act. In the 1948 revision of Title 28 this section was omitted as unnecessary "because the Rules * * * shall apply to all civil actions." S. Rept. No. 1559, 80th Cong., 2d Sess., p. 12. Section 411, in substantially the form of its final enactment, first appeared in the legislative history of the Tort Claims Act as Section 302 of H.R. 6463, 77th Cong., 2d Sess. That section was offered and accepted as a substitute for Sections 202 and 305 of H.R. 5373, 77th Cong., 2d Sess., which expressly provided for matters such as depositions and discovery against the Government. The purpose of the substitution was to eliminate the need for specific mention of these matters. See *Hearings Before House Committee on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess., pp. 61-62.

In the original enactment of the Federal Rules there was also indication of an intention to make discovery provisions of Rules 26-37 generally applicable to the Government. See *e.g., Proceedings of the Institutes on the Federal Rules of Civil Procedure, Washington, D. C.* 1938, pp. 101, 105, 266;

United States was generally to be liable as if it were a private individual; but to concede this general intention does not dispose of this case. For the issue, at this point, is the specific one of whether Congress waived or withdrew, as the Court of Appeals put it (R. 50), the executive privilege in Tort Claims cases. On that specific issue, all the relevant materials point definitively to a negative answer.

1. In the first place, the Tort Claims Act makes the Federal Rules applicable, and Rules 26 and and 34 are expressly restricted to matters "not privileged." There is ample place for use of the general discovery machinery of Rules 26-37 against the Government without extending it to override this express restriction.[36] And there is nothing in the legislative history of the Tort Claims Act which indicates that Congress meant in effect to punish the United States whenever the executive branch of the Government should assert a privilege which it had been asserting since almost the beginning of the Republic and which other branches had repeatedly refused to assail directly. Moreover, and most important, there is specific evidence in the legislative history of the Federal Rules,

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ibid., Cleveland Proceedings, p. 334. But, as we show *infra*, p. 58, this same history indicates an intention to except Government documents which are privileged.

[36] Still available against the Government are for example, interrogatories under Rule 33 (see, *e.g.*, R. 8-14), requests for admission of the truth of facts or the genuineness of documents under Rule 36, depositions under Rule 26 (obtained by subpoena under Rule 45) in matters not privileged, and discovery of the large mass of documents as to which no privilege is claimed.

which form an integral part of the Tort Claims statutory scheme, that the very privilege here asserted was to be recognized. In the *Proceedings of the Institutes on the Federal Rules,* the question was asked whether the rules as to discovery were intended to apply when the United States is a party. Professor Sunderland, of the Advisory Committee, which drafted the Rules, replied (*Proceedings of the Institutes on the Federal Rules of Civil Procedure, Washington, D. C.* 1938, pp. 266-267; see also *id.* at 105.):

> I suppose they do, and the only limitation with respect to the government would be that *if any subject ought to be considered privileged as a matter of governmental policy, it need not be disclosed under the discovery examination,* but all other relevant matters would have to be disclosed by the government upon a discovery examination [italics supplied].[37]

2. The statutory provision that the United States shall be liable "in the same manner and to the

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[37] Referring to the absence in the Tort Claims Act of a provision comparable to 28 U.S.C. 2507, which expressly authorizes the head of a department to refuse a call for information from the Court of Claims "when, in his opinion, compliance will be injurious to the public interest" (R. 53), the court below inferred that Congress intended to deny the privilege in Tort Act suits. But it is much more probable that Congress felt it unnecessary to include such a provision for tort claims because the Federal Rules were being made applicable and, with their specific provision for "privileged" matter, would fulfill the function of 28 U.S.C. 2507. It is significant that, probably for the same reason, there is no clause like Sec. 2507 for District Court Tucker Act suits, although this branch of the District Courts' jurisdiction is entirely "concurrent" with that of the Court of Claims. *United States* v. *Sherwood,* 312 U.S. 584, 589-591.

same extent as a private individual under like circumstances" does not constitute a "waiver". That provision is mainly concerned with marking the substantive liability of the United States (see *Feres* v. *United States,* 340 U.S. 135, 141-142), and even in that sphere it is not without exceptions, specific and implied. See *United States* v. *Hull,* 195 F. 2d 64, 67 (C.A. 1); 28 U.S.C. 2680. If in view of the applicability of the Federal Rules, the clause has any special bearing on procedural matters, it should be read in the light of the Court's pertinent remark in *Feres:* "We cannot impute to Congress such a radical departure from established laws in the absence of express congressional command." *Feres* v. *United States, supra,* at 146; see *United States* v. *Sherwood,* 312 U.S. 584, 589-590.

R.S. 161, as the executive has read it, embodies a policy of great strength and with a long and active history. The privilege to withhold documents from Congress and the courts has been in the forefront of our national life for over a century and a half. *Supra,* pp. 19-35. Surely there would have been some express legislative direction, some reference to the subject, if Congress had intended in the Tort Claims Act to waive, withdraw, or by-pass the privilege, assuming that it could do so. A general clause about suability as a private party, which clearly had another primary purpose, would hardly be adequate, particularly when the Federal Rules themselves referred generally to "privileged" documents. Rather, this is one of those many areas in which "the entire scope of Congres-

sional purpose calls for careful accommodation of one statutory scheme to another * * *." *Southern Steamship Co.* v. *Labor Board,* 316 U.S. 31, 47.

There is a further reason why the "private party" language in 28 U.S.C. 1346 and 2674 cannot control. As in *Feres,* we have here a field in which the United States cannot be likened to a private party. The documents are privileged because the Government claims that disclosure would be against the public interest; there can be no parallel claim in the case of a private party and no private interest of scope comparable to the public interest. Moreover, the public interest—by which the privilege requires the Secretary to be ruled in making his decision to produce or withhold—includes both the policy reasons for preserving secrecy and the opposing policy reasons for securing the fullest possible information for litigants. Thus the exercise of the privilege represents a considered judgment by the Secretary that the public interest will in the long run be best served by preserving secrecy, even though in the short run secrecy may in some cases and to some extent obstruct the public interest in full justice for the litigant. It must be presumed, we think, that in making this difficult decision, the Secretary gives due weight to both factors.[38] For this reason the Government can

[38] In this case, the Air Force went as far as it deemed it could without compromising the security of the documents themselves. It offered to furnish the names and addresses of the survivors, undertook to make them available for

never in this area be analogized to a private party. If a private litigant elects not to disclose, he is in effect determining that his own interests will be best served by preserving secrecy, even if his choice entails the penalty provided by the Rules. He therefore elects to pay the penalty. When the Secretary elects not to disclose, on the other hand, he is not considering his own interest but is weighing two opposing aspects of the public interest. And as we have shown, *supra*, pp. 37-52, he is the person best qualified to do so.

3. Further support for the view that it was not intended to treat the Government like a private party in respect to compelling discovery is to be found in the fact that Rule 55(e) of the Rules of Civil Procedure forbids default judgments against the United States "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court".[39] This provision prevents the entry of default judgments against the United States by the usual procedure, in private actions, of taking the allegations of the pleadings as true (cf. *United States* v. *Geisler*, 174 F. 2d 992, 999 (C.A. 7), certiorari denied, 338 U.S. 861), and was

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pre-trial depositions at the Government's expense, and guaranteed to authorize them to testify freely on all matters except those which are classified. See *infra*, p. 71.

[39] This provision is derived from Section 6 of the Tucker Act. Act of March 3, 1887, c. 359, 24 Stat. 505, 506. It was incorporated in the Rules and in the 1948 revision was accordingly dropped from the Judicial Code. See notes of Advisory Committee on Rules of Civil Procedure, S. Doc. No. 101, 76th Cong., 1st Sess., p. 271; H. Rept. No. 308, 80th Cong., 1st Sess., p. A 239.

enacted with a view to deterring collusive judgments.

This express restriction on default judgments where the United States is concerned would be inconsistent with the provisions of Rule 37(b)(2) *supra*, pp. 55-56, on which the District Court's bar order in this case was based, if Rule 37(b)(2) were held applicable to this case. Default judgments were only one of four alternative remedies provided by Rule 37(b)(2) for disobedience to a discovery order; and the court below held (R. 56-58) that since the District Court's order was supportable under the other provisions of Rule 37(b)(2), there was no conflict with the restriction on default judgments. Our contention here, however, need not be that Rule 55(e) expressly forbids the order entered by the District Court. Rather, we think that the presence of Rule 55(e) is a further significant indication that the United States was not meant to be treated exactly like a private party. In this case, where there was only one issue—that of negligence—the District Court's order left the Government in as bad a position as would the actual entry of a default judgment. Far from being authorized by the Rules, this action was contrary to their intention.

B. *The Decision Below Violates the Executive's Privilege by Penalizing the United States*

It is clear therefore that the Tort Claims Act and the Federal Rules do not seek to waive or withdraw or by-pass the executive's privilege

against discovery. On the contrary, they recognize and affirm it. The remaining question is whether the roundabout procedure adopted below violates this privilege which Congress has not sought to weaken or diminish, and which the Court of Appeals itself assumed would exist if a direct demand were made upon the Secretary.

The answer to this question is found in the further inquiry:—Does the procedure adopted below unduly interfere with the Secretary's exercise of his recognized privilege? And the answer here must be yes. The decision whether or not to disclose is the Secretary's alone; counsel for the Government in the tort action cannot compel him to do so and, indeed, are not permitted by him to see the documents. But it will not do to say that if he decides not to disclose, his enjoyment of the privilege is not prevented by the order barring the Government's defense in the tort action. If the decision of the lower courts is upheld, the Secretary is put in an intolerable position. Of course, such an order does not put an end to the secrecy which he finds the public interest requires, but the threat of the consequence of nondisclosure cannot do other than influence his decision. No government official who is conscious of his responsibilities can view dispassionately the turning over of large sums of public monies to persons who have made no showing that they are entitled to them. Nor can he readily yield when, in his view, so much in terms of the security of the nation and the welfare of thousands of airmen is at stake. The

Secretary is faced with an acute dilemma to which there is no available answer short of the abdication of responsibility and the sacrifice of the public interest.[40] It seems inadmissible to us that, on the one hand, the Secretary would be clothed with the responsibility of making the policy determinations necessary for the efficient administration of the Air Force, and then, on the other hand, shackled so he could not follow through on these determinations.

The position of the public treasury is no less anomalous. If the Secretary in spite of the sanction refuses disclosure, he has made a decision which is correct as a military matter. The custodians of the treasury, not being vested as is the Secretary with discretion on military affairs, have no more power of review than the courts or the Department of Justice. Yet the result is that without a real determination of plaintiffs' right to public funds, without an adjudication of whether or not the government acting through its em-

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[40] Public policy requires courts to be wary in exerting pressures on responsible officers, especially where the courts cannot issue direct commands. *Yakus* v. *United States*, 321 U.S. 414, 440. This has been recognized in the long line of decisions which have rendered public officers personally non-accountable to court and jury for their official acts. *Spalding* v. *Vilas*, 161 U.S. 483; *Lang* v. *Wood*, 92 F. 2d 211 (C.A. D.C.), certiorari denied, 302 U.S. 686; *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A. D.C.); *Grégoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949. As was said in the *Cooper* case, *supra*: "The reason * * * is simply one of public policy. 'Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public service.' De Arnaud v. Ainsworth, 24 App. D.C. 167." Cf. *Wilkes* v. *Dinsman*, 7 How. 89.

ployees was culpable in any manner, a money judgment, perhaps substantial, follows. The inevitable influence on the Secretary, arising from his concern for this anomalous position of the treasury, constitutes, in our view, an improper interference with his performance of the duties of his office.

As we have pointed out, *supra*, pp. 51, 54, the Secretary must weigh not only the public's interest in maintaining security but also its great interest in assuring litigants full information. These opposing interests being weighed in the balance, by the person best qualified to weigh them, there should not also be thrown into the scales the consideration that a decision one way will have the consequence of subjecting the public to a large judgment. To do so is to weight doubly the immediate interest of the private litigant in a way which goes far to compel disclosure regardless of the true measure of the public interest.

The real effect and result of the procedure followed below is thus to compel the Government to pay a penalty for the Secretary's decision. It is axiomatic that the United States is not subject to penalties unless the statute expressly provides. *Missouri Pac. R.R. Co.* v. *Ault*, 256 U.S. 554; *Dasher* v. *United States*, 59 F. Supp. 742, 743 (S.D. N.Y.); *Butler* v. *United States War Shipping Admin.*, 68 F. Supp. 441 (E.D. Pa.); *United States* v. *Nelson*, 91 F. Supp. 557 (N.D. Ill.). Congress cannot have intended to penalize the United States for its officer's performance of a duty recognized

by Congress itself. And if Congress did not so intend, the court violated the axiom in doing so.

It is this penal aspect, together with its unfair burden on the executive, that distinguishes the present case from cases in which discovery is sought against the United States as plaintiff. Cf. *United States* v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (W.D. La.), affirmed *per curiam* by an equally divided court, 339 U.S. 940.[41] Whatever may be the propriety of forcing the Government to an election between disclosing the documents pertaining to a transaction and fore-

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[41] The following lower court cases have denied discovery, even though the Government was plaintiff: *United States* v. *Lorain Journal Co.*, 10 F.R.D. 487 (N.D. Ohio); *United States* v. *Schine Chain Theaters*, 4 F.R.D. 108 (W.D. N.Y.); cf. *Walling* v. *Comet Carriers*, 3 F.R.D. 442 (S.D. N.Y.); but cf. *Walling* v. *Richmond Screw Anchor Co.*, 4 F.R.D. 265 (E.D. N.Y.). Contra: *Fleming* v. *Bernardi*, 1 F.R.D. 624 (N.D. Ohio). The following have granted discovery even though the Government was defendant: *Cresmer* v. *United States*, 9 F.R.D. 203 (E.D. N.Y.); *Wunderly* v. *United States*, 8 F.R.D. 356 (E.D. Pa.).

Under the analogous discovery provisions of the Admiralty Rules, discovery has been denied against the United States as libelee in the following: *Anglo-Saxon Petroleum Co.* v. *United States*, 78 F. Supp. 62 (D. Mass.); *The Wright Papoose*, 2 F. Supp. 43 (E.D. N.Y.); *Maryland to use of Kent* v. *United States*, [1947] A.M.C. 1336 (D. Md.); cf. *Alltmont* v. *United States*, 177 F. 2d 971 (C.A. 3). *Pacific-Atlantic S.S. Co.* v. *United States*, 175 F. 2d 632 (C.A. 4), certiorari denied, 338 U.S. 868, upheld the privilege for the report of a Naval Board of Inquiry. In *Bank Line Ltd.* v. *United States*, 68 F. Supp. 587 (S.D. N.Y.) discovery was granted against the Government which then sought a writ of prohibition from the Court of Appeals. The latter held this relief to be beyond its jurisdiction but remanded the case with a recommendation to the district court that it consider some of the arguments and authorities discussed in Point I of this brief. 163 F. 2d 133 (C.A. 2). On remand the district court refused to withdraw its order. 76 F. Supp. 801 (S.D. N.Y.).

going its right to maintain an action based on that transaction, it seems to us clearly improper to compel it to elect between disclosing and foregoing a defense to an action against it.[42] In the formulation of an administrative policy which is to be enforced by instituting litigation, account may be taken, as an integral part of the policy, of the fact that disclosure is a condition precedent to the right to maintain the suit; and the agency may choose its ground accordingly. But where the Government is required to defend tort actions, there is no choosing of ground by either party; the occasion for bringing suit is purely fortuitous, and no administrative policy can properly take account of it.

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[42] There is even more ground for distinguishing the line of criminal cases which hold that instituting the prosecution constitutes a waiver of the privilege. *United States* v. *Andolschek*, 142 F. 2d 503 (C.A. 2); *United States* v. *Krulewitch*, 145 F. 2d 76 (C.A. 2); *United States* v. *Beekman*, 155 F. 2d 580 (C.A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C.A. 2). Criminal defendants are by the common law, by statute, and by the Constitution afforded greater safeguards than are parties to civil actions.

Judge Hand's opinions in the line of cases cited appear to look in the direction of recognizing the Government's privilege not to disclose in civil cases, even while holding that institution of a criminal prosecution waives it. Thus, he says, "*While we must accept it as lawful for a department of the government to supress documents, even when they will help determine controversies between third persons*, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate." *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C.A. 2) (italics supplied). And again: "We need not say that there can never be situations in which a privilege created by departmental regulation will not prevail, just as it would prevail if Congress had created an unconditional privilege * * *." *United States* v. *Grayson*, 166 F. 2d 863, 870 (C.A. 2).

When there is added to this fortuitous factor the element that if the Government chooses not to waive its privilege, it is subjected to a heavy penalty, it is clear that to compel the election is to violate the privilege.[43]

Accordingly, in the absence of any specific indication of a contrary intention, we do not believe that Congress intended—even if it has power—to

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[43] There is an analogy between the indirect compulsion to produce exerted below and the long line of cases on unconstitutional conditions—cases holding that the states may not, as a condition to the exercise of a privilege which the state may constitutionally withdraw outright, require the relinquishment of a constitutional right which it could not directly withdraw. See, *e.g.*, *Terral* v. *Burke Construction Co.*, 257 U.S. 529; *Frost Trucking Co.* v. *Railroad Comm.*, 271 U.S. 583, and cases cited. Thus, Congress could not, as a condition of its not exercising its power to withdraw defenses in suits against the Government, require relinquishment of the executive's constitutional privilege against disclosure. "In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." *Frost Trucking Co.* v. *Railroad Comm.*, 271 U.S. 583, 593.

On the other hand, *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, which held that a state had power to compel a corporation to make discovery of documents held outside the state, as a condition of the right to do business (cf. *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541; *Wittenberg Coal & Coke Co.* v. *Compagnie Havraise Peninsulaire, etc.*, 22 F. 2d 904 (C.A. 2)), is not analogous, because a private party—unlike the executive branch of the Government—has no constitutional privilege not to produce; hence the condition is not unconstitutional. "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights." *Frost Trucking Co.* v. *Railroad Comm.*, 271 U.S. at 593-594. Compare also *Hovey* v. *Elliott*, 167 U.S. 409.

override or waive the historic privilege of the executive, merely by incorporating the Federal Rules into the Tort Claims scheme. Congress can hardly have considered the matter specifically in sponsoring the Rules, the formulation of which was left to this Court. Cf. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 14. And whenever Congress has been confronted specifically with the question of the need to preserve secrecy in public accident investigations, it has decided, as in the Interstate Commerce Act and the Civil Aeronautics Act, *supra*, pp. 45-46, in favor of nondisclosure. The same result is required here by the Rules' exemption of privileged matter, including, as it clearly does, governmental privilege in whatever areas the constitution, history or public policy demand it.[44]

III

Good Cause for Discovery Has Not Been Shown

Thus far we have argued that the court below gave to the Tort Claims Act and to the Rules of Civil Procedure a construction at odds with the long standing constitutional and statutory privilege of the executive not to disclose. We wish now to show that, apart from any question of privi-

[44] To read the Tort Claims Act or the Federal Rules so as in effect to require the disclosure of privileged documents would either be unconstitutional, or at least of such doubtful constitutionality, that, if possible, it should not be done. *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82; *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.*, 288 U.S. 14, 40; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348; *Labor Board* v. *Jones & Laughlin Corp.*, 301 U.S. 1, 30; *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 351-352; *Ex parte Endo*, 323 U.S. 283, 299.

lege, the order of the District Court, approved by the court below, was contrary to the Rules. The right to discovery under Rule 34 is in all cases conditional upon a showing of "good cause" for discovery. In view of the weighty questions involved in the course adopted by the court and in view of the relatively minor importance of discovery in the circumstances of this lawsuit, we think no adequate showing of cause has been made in this case. We recognize that the determination of what constitutes good cause in a given case is largely within the discretion of the District Court. But we think that in this case the court abused its discretion.

The District Court predicated its finding of good cause upon the respondents' bare contention that the documents sought contained information necessary in preparation for trial, that they were in possession of the United States, and that the respondents knew of no other way to obtain knowledge of their contents than by examining them (R. 14-16). The court, in its opinion granting respondents' motion for production (R. 17-21), found that good cause had been shown largely because of the burden, expense, and inconvenience placed on plaintiffs in taking the depositions of witnesses located in a distant state. The lower court also stated that the requested documents would be necessary because the length of the time that had elapsed since the air crash might tarnish the memory of the witnesses and the fact that they were subject to military authority would tend to make them biased (R. 18-19).

To meet the objections of the lower court, the Air Force formally offered to make the three witnesses available "at the expense of the United States for interrogation by the plaintiffs at a place and time to be designated by the plaintiffs" (R. 27).[45] This offer further averred that the witnesses would "be authorized to testify regarding all matters pertaining to the cause of the accident except as to facts and matters of a classified nature," and that these witnesses would be permitted and authorized "to refresh their memories by reference to any statements made by them before Aircraft Accident Investigating Boards or Investigating Officers, as well as other pertinent and material records that are in the possession of the United States Air Force" (R. 27). Respondents thus have an opportunity, as yet unexplored, to take the depositions of the witnesses whose statements are desired at little or no inconvenience or expense to themselves. Furthermore, they have the assurance of the Air Force that these witnesses will be fully cooperative and will have complete and detailed knowledge of the events as they happened through the use of their own statements and any other pertinent or material records. This offer by the Air Force leaves the finding of good cause by the lower court completely unsupported.

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[45] The offer was made although cases have held that the absence of witnesses from the state where the deponent resides is insufficient cause to warrant an order requiring production of such documents. See *e.g.*, *Lester* v. *Isbrandtsen Co.*, 10 F.R.D. 338 (S.D. Tex.); *Reeves* v. *Pennsylvania R. Co.*, 8 F.R.D. 616 (D. Del.); *Berger* v. *Central Vermont R. Co., Inc.*, 8 F.R.D. 419 (D. Mass.).

The Government's offer to produce the witnesses, even standing alone, might well be regarded as sufficient to obviate all cause for discovery, but added to this must be the consideration that the refusal to produce the documents themselves was made for important reasons of public policy, and that any order requiring discovery was of doubtful validity. *Hickman* v. *Taylor*, 329 U.S. 495, implies that where there are strong considerations of public policy militating against disclosure, the party seeking discovery must show exceptional circumstances in order to establish good cause. In that case the policy considerations revolved around the secrecy of the lawyer's "work product"; in this case, they center about the constitutional, doctrinal, and historical factors that we have discussed in the preceding sections of this brief. In other words, the very existence of substantial reasons for claiming privilege adds to the burden on the party seeking to show cause why production of the documents is necessary.

From the Government's point of view, an order by the court compelling discovery would have had an important effect on the policy and operations of a coordinate branch of our tripartite system. From the respondents' point of view, however, the granting of discovery would not go to the heart of their case. Discovery is merely one of many aids to trial. There is no showing that the material sought could be used in evidence. Cf. *Chapman* v. *United States*, 194 F. 2d 974 (C.A. 5), now pending on petition for a writ of certiorari, No. 105,

this Term. It is merely a means of discovering evidence, and it is apparent that until resort to interrogatories, depositions, and pretrial conferences has been exhausted without aiding respondents to build a case on the merits, to deny discovery is not to withhold substantial justice. And at least so long as substantial justice is not denied a proper regard by the court for the aims and operations of a coordinate branch of the Government should compel a court to hold its hand.[46]

We suggest that the only proper course for the District Court would have been to delay making any order requiring production until the witnesses could have been produced, their depositions taken, and a pretrial conference held. Only then could the court have determined whether an invasion of the claimed privilege was really necessary. The course adopted by it was erroneous.[47]

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[46] "For aught that appears, the essence of what [respondent] seeks either has been revealed to him already through the interrogatories or is readily available to him direct for the asking." *Hickman* v. *Taylor*, 329 U.S. 495, 509.

[47] In *Boske* v. *Comingore*, 177 U.S. 459, and *Touhy* v. *Ragen*, 340 U.S. 462, the Court held that, where production of departmental documents is declined by virtue of orders of heads of departments issued pursuant to R. S. 161, the validity of that action cannot be challenged except by direct process against the head of the department. The court below held, however, that in this case direct process need not be issued against the Secretary of the Air Force because the suit was against the United States and the Secretary was bound to obey an order issued against the United States as a party defendant. We believe, however, that the requirement of the *Boske* and *Touhy* cases was more than merely technical and cannot be avoided simply because the United States is the party-defendant. We submit that those cases require that, after the decision by the head of the department, the issue of the validity of his decision should be tested directly. This

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded to the District Court for a new trial.

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is especially true where, as shown above (pp. 52-69), there is no reason to believe that Congress has sought to by-pass the executive's right to claim privilege. Thus, proceedings should have been instituted under Rules 26 and 45 to bring the Secretary of the Air Force squarely before the court. If such a procedure were followed, final decision on the propriety of his action would permit both parties to the case to proceed to the merits, either with or without the disclosure requested.

However, the Secretary's action in appearing and filing a claim of privilege in the District Court (*supra*, pp. 5-6) may well have constituted an *ad hoc* agreement to test the privilege question in the Tort Claims suit itself. We no longer contend, therefore, that the judgment below should be reversed on the ground that the issue should have been decided in a proceeding directed against the Secretary personally.

APPENDIX

1. Section 161 of the Revised Statutes, 5 U.S.C. 22, provides:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

2. 28 U.S.C. 2674 provides in pertinent part as follows:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

3. The pertinent provisions of the Federal Rules of Civil Procedure read as follows:

> Rule 34. *Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.* Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs,

objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Rule 37. *Refusal to Make Discovery: Consequences.*

* * * * *

(b) Failure to Comply with Order.

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(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under

Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

Rule 55. *Default.*

* * * * * *

(e) Judgment against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

4. The pertinent provisions of the Air Force Regulations read as follows:

AF Regulation No. 62-7.

Department of the Air Force Headquarters,
United States Air Force, Washington
17 December 1947

FLYING SAFETY

Safeguarding Aircraft Accident Information

(This Regulation supersedes AF Letter 62-7, 19 September 1944).

1. *Definitions.* For the purpose of this Regulation the following definitions will apply.

a. *"Extract of a Report"*—is a summary, excerpt, quotation, or condensation of the report which contains the time or place of the incident, names of the persons involved, or aircraft serial number.

b. *"Officials in the Authorized Chain of Command"*—are commanders and individuals under their command at all echelons, in the National Military Establishment

whose official duties in connection with aircraft accident prevention require knowledge or possession of accident information.

2. *General.* Reference is made to AR's 95-120, 380-5, and 420-5; AF Regulations 46-17, 47-4, and 62-14; and AF Letter 45-6. In addition to the established procedure for handling and releasing classified information, there are additional safeguards necessary for aircraft accident information. Accident investigations are not conducted under the 70th Article of War. Aircraft accident information is procured from reports of personnel who have waived their rights under the 24th Article of War in the interest of accident prevention upon the assurance that the reports will not be used in any manner in connection with any investigation or proceeding toward disciplinary action, determination of pecuniary liability, or line-of-duty status or reclassification.

3. *Purpose.* Since certain facts have been accumulated as a result of aircraft accident investigation, it is convenient in many instances to abstract data from these reports for purposes other than the prevention of accidents. This violates the purpose for which the information was accumulated. The purpose of this Regulation is to limit the use of accident information to accident prevention and such additional uses as authorized in this Regulation.

4. *Handling of Aircraft Accident Information within the Authorized Chain of Command:*

a. Reports of boards of officers, special accident reports, or extracts therefrom will not be furnished or made available to persons outside the authorized chain of command without the specific approval of the Secretary of the Air Force.

b. All aircraft accident data (reports, statistics, studies, publications, etc.) will be classified no lower than *Restricted.* Higher classification is governed by AF Regulation 62-14.

* * * * *

5. *Release of Aircraft Accident Information:*

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b. Reports of boards of officers, special accident reports, or extracts therefrom will not be furnished or made available to persons outside the authorized chain of command without the specific approval of the Secretary of the Air Force.

* * * * *

g. * * * (1) Manufacturers' representatives who are stationed with Air Force organizations to assist in solving maintenance and operational problems of products manufactured by the organizations they represent are to be given full access to the

scene of any and all accidents involving such products and to all information concerning such accidents that may be obtained by the Air Force except the official written reports of investigations or extracts therefrom.

* * * * *

6. *Responsibility:*

a. Responsibility for the release of reports of boards of officers, special accident reports, or extracts therefrom regarding aircraft accidents to persons outside the authorized chain of command or administration will rest solely with the Secretary of the Air Force.

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